TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 87.

AXEL W. HALLENBORG AND J. EDWARD ADDICKS, APPELLANTS,

vs.

COBRE GRANDE COPPER COMPANY ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED AUGUST 23, 1904.

(19,453.)

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No. 822.

In the Supreme Court of the Territory of Arizona.

AXEL W. HALLENBORG ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees. } Number—.

Transcript on Appeal.

Hawkins & Wilson, attorneys for appellants.
Atwater & Cruikshank, of counsel.

Filed this 12 day of Jan'y A. D., 1903.
S. M. CULLOM, Clerk.

1 In the District Court of the Fourth Judicial District of the Territory of Arizona in and for the County of Yavapai.

AXEL W. HALLENBORG, Plaintiff,
against
COBRE GRANDE COPPER COMPANY, E. B. GAGE, W. M. Adamson, John H. Costello, J. Henry Wood, and Con. O'Keefe, Its Directors; William C. Greene, George Mitchell, Phœnix National Bank of Phœnix, Arizona Territory; Cananea Consolidated Copper Company, and Greene Consolidated Copper Company, Defendants. } Complaint.

Comes now the plaintiff in the above entitled action, and on his own behalf and on behalf of all other stockholders of the Cobre Grande Copper Company and all other creditors of said company similarly situated who may desire to come in and contribute as parties plaintiff to the expenses of this action, alleges for his complaint herein:

2 I. The defendant Cobre Grande Copper Company is a corporation organized under the laws of the Territory of Arizona and having its principal office at Phœnix, in said Territory, with a capital stock of $500,000 divided into 200,000 shares of $2.50 each. The defendant E. B. Gage is and has been a director and the president of said corporation since November 14, 1899; the defendants W. M. Adamson, John H. Costello and Con. O'Keefe are and have been since November 27, 1900, directors of said corporation; and the defendant J. Henry Wood is now and has been since November 27, 1900, a director and the secretary of said corporation.

The defendant Phœnix National Bank of Phœnix, Arizona Terri-

tory, is a corporation organized under the laws of the United States, having its principal place of business at Phœnix, in said Territory.

The defendant Cananea Consolidated Copper Company is a corporation organized under the laws of the State of Sonora, in the Republic of Mexico; the Greene Consolidated Copper Company is a corporation organized under the laws of the State of West Virginia, and the defendant William C. Greene is now and has been since prior to January 1, 1900, the president of said last named corporation and a large stockholder therein. The defendants William C. Greene and George Mitchell, and their associates, confederates, and agents, are now and have been since the organization of said corporations in control of and the actual managers of both the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company.

I½. That plaintiff, Axel W. Hallenborg, is a resident of the city, county and State of New York, and that defendants E. B. Gage and W. M. Adamson are residents of the county of Yavapai, in the Territory of Arizona. That defendant J. Henry Wood is a resident of Maricopa county, Arizona, and defendants William C. Greene, George Mitchell and Con. O'Keefe are residents of Cochise county, Arizona.

3 II. The plaintiff is now and has been for a long time past a stockholder in and creditor of the defendant, The Cobre Grande Copper Company, and is now a creditor of the said corporation in the sum of upwards of $40,000, part upon notes and part upon open account.

The plaintiff is now the owner and holder of promissory notes made by the said Cobre Grande Copper Company, of the dates, amounts and payable as follows, viz:

Date.	Amount.	Payable.
January 19, 1900	$12,000.00	April 15, 1900
March 8, 1900	14,175.00	May 15, 1900
May 1, 1900	6,000.00	August 1, 1900
May 23, 1900	4,000.00	August 24, 1900
August 18, 1900	1,000.00	Nov. 18, 1900
June 29, 1900	1,905.25	October 1, 1900
Total	$39,080.25	

Of the above mentioned notes, the first two were made payable to the order of one Benjamin Orne, and were on or about November 13, 1900, purchased by the plaintiff of said Orne, and on or about said day the said Orne transferred to the plaintiff all his right, title and interest in and to the said notes, and plaintiff is now the owner and holder of all of said notes; each of the said notes is by its terms payable with interest from date at the rate of six per cent. per annum. Nothing has ever been paid on account of said notes or any of them and the whole amount payable by the face of said

notes, viz: $39,080.25 and interest on the amount of each note from the date thereof is now due and owing.

The defendant Cobre Grande Copper Company is also indebted to the plaintiff for further sums of money, amounting to several thousand dollars, for cash advances by the plaintiff to the said corporation, for which notes have not yet been issued, although at the time of making the said advances there was an agreement that notes therefor should be executed to the plaintiff.

4 The plaintiff is a stockholder in said Cobre Grande Copper Company to the amount of upwards of 8,000 shares, and has been such stockholder since on or about the 15th day of July, 1900.

III. [Since prior to January 1, 1900, the Cobre Grande Copper Company has been engaged in a series of litigations with the defendants William C. Greene, George Mitchell, and their associates, confederates and agents, arising out of the following facts:]

Since prior to January first, 1900, the Cobre Grande Copper Company has been engaged in a series of litigations with the defendants William C. Greene, George Mitchell and their associates and confederates, which litigations are as follows, and were based upon the claims, charges and allegations made by the Cobre Grande Copper Company in that behalf.

In the fall of 1899 the Cobre Grande Copper Company was in possession of certain valuable mining properties, situated in the Cananea mountains, in the State of Sonora, Republic of Mexico, under and by virtue of a contract originally made by the defendant Greene, then the owner of said mines and mining properties, to defendant Mitchell, and by said Mitchell on or about May 26, 1899, transferred and conveyed to the defendant Cobre Grande Copper Company with the consent of said Greene, by virtue of which contract and transfer and consent, the defendant Cobre Grande Copper Company became entitled to the ownership and possession of said mines and mining properties. That thereafter and in or about September, 1899, the defendants Greene and Mitchell, being at that time directors of the Cobre Grande Copper Company, in confederation with certain others, formed a scheme to deprive the Cobre Grande Copper Company of said mines and property and acquire

5 it for themselves, and on or about October 11, 1899, in pursuance of this scheme by certain fraudulent tricks and devices, they obtained the actual physical possession of said mining properties and ousted therefrom the defendant, The Cobre Grande Copper Mining Company and its rightful agents and servants; and said Greene, being then in physical possession of these properties, claimed to be the absolute owner of them, and thereupon, in confederation with one of his attorneys named Norton Chase, he organ-

The above portions of the complaint enclosed in brackets were by amendment on the trial omitted, and the portion in italics substituted in their place.

ized under the laws of the State of Sonora and of the Republic of Mexico, where the mines were situated, the defendant corporation Cananea Consolidated Copper Company; the said corporation, however, being in fact composed only of himself and his attorney, the said Norton Chase. And thereupon the said Greene executed, in apparent conformity with the laws of the Republic of Mexico, a deed of all the said mining property, of which he had unlawfully taken possession as aforesaid, to the said Cananea Consolidated Copper Company, and since then the said corporation has claimed to be the owner of said properties and has exercised acts of dominion and control over them. The said Cananea Consolidated Copper Company has never of itself carried on any business, and the object of forming it was to comply with the laws of Mexico, which prevent a foreigner or a foreign corporation from owning land within what is known as the prohibited zone, in which district said mines are situated, and all the stock of the said Cananea Consolidated Copper Company was immediately transferred by the said Greene to the defendant, The Greene Consolidated Copper Company, which the said Greene caused to be organized under the laws of the State of West Virginia with a capital stock of $5,000,000, divided into five hundred thousand (500,000) shares of the par value of ten (10) dollars each, and since then the said Greene Consolidated Copper Company has claimed to be the owner of and to be operating the said mines of which the defendant Cobre Grande Copper Company was
6 ousted and dispossessed by the defendant Greene, and has largely advertised the sale of its stock and claimed to have a good and clear title to the said property, but both the said Cananea Consolidated Copper Company and the said Greene Consolidated Copper Company were and are mere tools and instruments used by said Greene and his confederates in furtherance of their fraudulent schemes and organized solely for that purpose.

Upon being ousted from said property, the said Cobre Grande Copper Company instituted certain legal proceedings in the courts of the State of Sonora, in the Republic of Mexico, where said mining properties are situated, to recover possession of said mines, mining claims, property, appurtenances and supplies from the defendants Greene, Mitchell, The Cananea Consolidated Copper Company and the Greene Consolidated Copper Company, and for the recovery of a large amount of the product of said mines appropriated by said last named defendants or by said Greene to their own use, and said proceedings are still pending and undermined.

The defendant, The Greene Consolidated Copper Company, after having by the means aforesaid got into possession of the said mines, proceeded to extract ore therefrom and to turn it into copper matte and ship said matte to various points and places in the United States, and thereupon, the Cobre Grande Copper Company, claiming under the agreement made between Greene and Mitchell and assigned to and owned by it to be the owner of the ore in said mines, in or about the months of January, 1900, and August, 1900, brought

actions of replevin or in the nature of replevin, to recover possession of the matte so shipped, which actions were brought at the city of New York, in the State of New York, and at El Paso, in the State of Texas, and thereupon the Greene Consolidated Copper Company, or some of its agents, attorneys or confederates, put in an adverse claim or demand to the same, and the litigation in regard to the said matte (commonly known as the "matte suits") is still pending and undetermined.

7 The said Greene and Mitchell and their confederates also attempted to get the control of the defendant Cobre Grande Copper Company by the use of stock held by them in that company, which, however, was in fact less than a majority thereof, and they claimed and pretended, in the month of November, 1899, to have held a regular meeting of stockholders for the purpose of electing directors of said company, and claimed and pretended that the said Greene, Mitchell and certain of their confederates had been duly elected directors of said company and officers thereof, although, as a matter of fact the meeting at which they claimed to have been elected directors was not a regular meeting of stockholders, and thereupon the said Green- and Mitchell and their confederates claimed that they were such officers and directors of the Cobre Grande Copper Company, and endeavored to exercise the powers and functions of such officers and directors, and thereupon and in or about the month of December, in the year 1899, upon an application of the defendant E. B. Gage, who at that time was the duly elected president of the Cobre Grande Copper Company, a proceeding in the nature of a *quo warranto* was taken by the attorney general of the Territory of Arizona to enjoin and prevent the said Greene and his confederates from acting or assuming to act as such officers and directors of the Cobre Grande Copper Company and that action or proceeding is still pending and undetermined.

The said Greene and his confederates, in order further to embarrass the Cobre Grande Copper Company and hinder and delay it in the prosecution of its rights against them, in or about the month of December, 1899, caused one Isabella Chase, one of said confederates and a stockholder or pretended stockholder in the said Cobre Grande Copper Company, to apply to the courts of the Territory of Arizona for a receiver of said corporation upon the ground of insolvency and for other reasons, and that suit is now pending in the courts of this Territory and undetermined.

8 The defendant Greene, confederating with Mitchell and the other persons interested with him in the said Greene Consolidated Copper Company, also claimed and pretended that the contract between Greene and Mitchell for the sale and purchase of said mines above mentioned had lapsed and determined on account of the failure to make a certain payment of $37,500 thereon, which was claimed to have been due on November 26, 1899, and thereupon said Greene applied to the defendant Phœnix National Bank, of Phœnix, Arizona, to deliver up to him certain deeds to the said mines and

which had been placed *in escrow* with said bank by the defendants Greene and Mitchell, and thereupon the Cobre Grande Copper Company brought an action in the third district court, county of Maricopa, in this Territory, against the said Greene and Mitchell and the Phœnix National Bank to prevent the delivery up of said deeds and to have the rights of the Cobre Grande Copper Company in and to said contract of sale and purchase determined and adjudged.

The said action was brought in aid of the efforts of the said Cobre Grande Copper Company to recover the said properties in Mexico, and a part of the relief demanded in the said action was that the plaintiff therein, namely, The Cobre Grande Copper Company, might be permitted within a reasonable time after its restoration to the possession of said mines, to make said payment of $37,500, which payment it was alleged said Greene and Mitchell had prevented by their forcible and fraudulent acts and misconduct, as aforesaid; and further, that said Greene might be required to account to the said Cobre Grande Copper Company for the proceeds of the product of said mines and mining claims, together with all supplies, material and property of the said Cobre Grande Copper Company taken and appropriated by him. All the defendants in that action appeared therein and answered on the merits. A preliminary injunction was granted by said court, in accordance with the prayer of the complaint, restraining the delivery of said deeds, and an order made continuing the same pending the action, and the cause was
9 duly tried before the Hon. Webster Street, judge, and decision thereon reserved, all on or before the first of December, 1900, and all on or before the agreement to discontinue as hereinafter set forth, and there was and is much and reasonable probability of said action being decided favorably to the said Cobre Grande Copper Company, as the plaintiff has been informed by counsel learned in the law and verily believes. The said action is also pending and undetermined.

Each and every of said litigations, suits, actions and proceedings aforesaid were a part of the dispute and controversy aforesaid originating out of and connected with the claim of said Greene and his agents, including the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company to get control and possession of all the property of the Cobre Grande Copper Company, and especially of the mining properties aforesaid, and each and every one of said suits, actions and proceedings which were begun and commenced by the Cobre Grande Copper Company or in its behalf, was meritorious and well founded in law and in equity, and all were necessary steps and proceedings to defeat the fraudulent schemes and designs of said Greene and his confederates, associates and agents as aforesaid, and to save and protect the property and existence of the said Cobre Grande Copper Company, and in each and every of said actions and proceedings where the Cobre Grande Copper Company appeared as defendant, it was defending for the

purpose of maintaining its just rights and claims to its property against the unlawful attacks of said Greene and his confederates, associates and agents, made in pursuance of such fraudulent schemes.

By means of the corrupt, wicked and nefarious schemes and unlawful acts and misconduct of the said defendants Greene and Mitchell and their confederates, agents and tools, including the corporations, the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company, the Cobre Grande Cop-
10 per Company (whose directors and trustees the said Greene and Mitchell were or claimed to be when they ousted said corporation from its mines and property as aforesaid) has been unlrwfully deprived of the possession, use and enjoyment of its mines and property as aforesaid and the proceeds of said mines have been diverted to the use of the said defendants Greene and Mitchell and their confederates, associates and agents and by the same means the said Greene and Mitchell and the said two corporations organized by them claim to have deprived the said Cobre Grande Copper Company of all right, title and interest in and of all right to recover the possession and enjoyment of said mines and property, or any part or parts thereof, to the ruin and destruction of said Cobre Grande Copper Company and the great loss and damage of the plaintiff as a stockholder therein and creditor thereof and the like loss and damage of all other persons similarly situated.

IV. On or just prior to December 12, 1900, the defendants William C. Greene and the Greene Consolidated Copper Company, and their associates, confederates, agents and attorneys, conspired together to get the control and management of the Cobre Grande Copper Company in order to stop the litigation against them and to secure the undisputed possession of the mines from which the Cobre Grande Copper Company had been wrongfully ejected, and for the purpose of controlling the suits brought by the Cobre Grande Copper Company, as aforesaid, in which they anticipated an unfavorable decision which would restore the Cobre Grande Copper Company to possession and control of its property and deprive the Greene Consolidated Copper Company of the mines and property belonging to said Cobre Grande Copper Company and upon which its stock had been issued, and which was then selling in the market at the rate of ten dollars per share, and thereupon they entered into a fraudulent and corrupt contract and conspiracy with the defendant E. B. Gage and the other directors of the Cobre Grande Copper Company,
11 wherein and whereby it was agreed between the said William C. Greene and the Greene Consolidated Copper Company, by the said William C. Greene as its president, on one side, and the defendant E. B. Gage, and the Cobre Grande Copper Company, by E. B. Gage, its president, on the other side, as follows:

The defendant Gage then held as trustee for certain stockholders of the Cobre Grande Copper Company one hundred and fifteen thousand and forty-nine (115,049) shares of the capital stock of said cor-

poration (being a majority thereof), with power to dispose of the same, and thereupon the defendants Greene and the Greene Consolidated Copper Company agreed to buy from the defendant Gage said one hundred and fifteen thousand and forty-nine (115,049) shares of stock at the price of two dollars and fifty cents ($2.50) per share, and the said Gage and the other defendants, directors of the said corporation, to wit, the defendants W. M. Adamson, J. H. Costello, J. Henry Wood and Con O'Keefe as a part of said transaction agreed that upon payment for said stock being made they would each and every of them resign as directors of the said Cobre Grande Copper Company and that said Greene and the Greene Consolidated Copper Company should thereupon be allowed to elect and appoint officers and directors of the said Cobre Grande Copper Company in their own interest and further that all the suits, actions and proceedings above mentioned brought by the Cobre Grande Copper Company for the protection of its rights against the said Greene and Mitchell and the Greene Consolidated Copper Company should be dismissed and withdrawn to the end that no claim should be made by the Cobre Grande Copper Company for or in respect to the mining property in Mexico of which it had been ousted and dispossessed by the said Greene and his confederates. It was also further agreed that the said E. B. Gage should have and receive a large personal benefit and advantage to himself, to wit, five thousand (5,000) shares of the stock of the Greene Consolidated Copper Company for his own use and benefit, which said stock was at that time selling on the
12 market at ten dollars per share, and it was also further agreed that the defendant J. H. Costello, a director of said corporation, should have a large personal benefit to himself, to wit, that his note for $23,000 to the Cobre Grande Copper Company should be surrendered to him.

The said agreement which was made about December 12th, 1900, did not provide for any personal benefit to the other directors, Adamson, Wood and O'Keefe, except the purchase of stock held by them in the Cobre Grande Copper Company, but the plaintiff alleges on information and belief that by a secret compact made between them and the said Greene and the Greene Consolidated Copper Company, each of them has contracted for and expects to receive a large personal gain and advantage, either by a transfer to him or for his benefit, of stock in the Greene Consolidated Copper Company, or by some other transfer or payment to him or for his benefit.

The said agreement of December 12th, 1900, was made by said E. B. Gage acting for and on behalf of the Cobre Grande Copper Company as president thereof and as trustee for the holders of said 115,049 shares of stock above mentioned, and was made with the knowledge and consent of the other directors in said Cobre Grande Copper Company, to wit, the defendants W. M. Adamson, John H. Costello, J. H. Wood and Con O'Keefe, and thereafter the said defendants Gage, Adamson, Costello, Wood and O'Keefe held a meeting as directors of the Cobre Grande Copper Company and assumed

to ratify said agreement on behalf of the Cobre Grande Copper Company, and the said directors and each of them have conspired together to carry out said agreement, and they and each of them intend and threaten to carry out said agreement and to turn over the management and control of the Cobre Grande Copper Company to its enemies and plunderers, the said Greene and the Greene Consolidated Copper Company, and in view of the facts and circumstances aforesaid any request or application to the directors or officers of the Cobre Grande Copper Company to take proper action
13 in the premises to protect the rights of this plaintiff and other stockholders and creditors similarly situated would be useless and unavailing.

The said agreement and the whole thereof was and is illegal and fraudulent as to plaintiff and as to all persons creditors and stockholders similarly situated, and the object and effect thereof was to transfer to the opponents and enemies of the Cobre Grande Copper Company the management and control of that corporation with the intent and design that such management and control should be used to prevent the enforcement of the just claims and demands of the said Cobre Grande Copper Company against the said William C. Greene, the Greene Consolidated Copper Company, and their agents, attorneys and confederates who were in possession of and unlawfully withholding the property of the Cobre Grande Copper Company, and to enable the said Greene and his confederates to sacrifice and destroy the rights of the creditors and minority owners of stock in the said Cobre Grande Copper Company, including this plaintiff.

V. The said mines and mining claims in Mexico concerning which the said litigation exists, and of which the said Cobre Grande Copper Company has been endeavoring to obtain possession and which are wrongfully withheld by the said William C. Greene and the Greene Consolidated Copper Company, constitute the sole and entire property of the Cobre Grande Copper Company, and upon the discontinuance and withdrawal of such suits the Cobre Grande Copper Company will have no property or funds with which to pay its debts or to distribute as dividends or profits among its stockholders, and said last named agreement is illegal, fraudulent and unjust and a total failure on the part of the officers and directors of the Cobre Grande Copper Company to faithfully or legitimately perform the duties of their trust, and a virtual repudiation thereof by them and if allowed to be carried out by this court, will destroy and
14 damage the interests of this plaintiff as a creditor and stockholder, and all others similarly situated.

The said mining property of which the Cobre Grande Copper Company is seeking to recover possession is of great present and prospective value, namely, of the value of $5,000,000 or thereabouts; that the plaintiff purchased the stock of said corporation and advanced money as aforesaid, for the purpose of legitimately developing the property and of investing therein, and of holding said stock as

an investment, with the view to the development of said property and large appreciation of said stock in value. That a part of the object and intent of the transaction of December 12th aforesaid was and is to compel plaintiff and all other stockholders similarly situated to sacrifice their stock to the said Greene and Mitchell and their confederates, at $2.50 a share, or less, whereas, in truth and in fact, the said stock is worth much more, and plaintiff expects if the property is properly managed, that said stock will appreciate in time to the value of $25 a share. That the defendants Greene and Mitchell and the said two corporations controlled by them and their confederates threaten and intend to carry out the scheme as aforesaid to practically destroy and wreck the Cobre Grande Copper Company, to compel the minority stockholders to sell their stock to them at terms to be dictated by said Greene and Mitchell and their confederates when they shall be in control of a majority of said stock of the Cobre Grande Copper Company, and ultimately to turn over all the assets and property of the said Cobre Grande Copper Company to said Greene and Mitchell or the Greene Consolidated Copper Company or the Cananea Consolidated Copper Company, or to some other combination controlled by them. That neither the said Greene, Mitchell nor the Cananea Consolidated Copper Company nor the Greene Consolidated Copper Company is nor are they responsible, nor are they any of them able to respond in damages to the plaintiff for the wrongs perpetrated and intended by them as aforesaid, nor has plaintiff nor will he have any adequate
15 remedy in law. That the Cananea Consolidated Copper Company is a foreign corporation without property in this territory or in the United States, and that it and the said Greene Consolidated Copper Company, and each of them, are without means or assets of any kind; the only property claimed to be owned by them consisting of the mining properties of the Cobre Grande Copper Company unlawfully seized and taken by them as aforesaid.

Wherefore, plaintiff demands judgment that said Cobre Grande Copper Company and the defendants, its directors and officers, and all others, its agents, attorneys and solicitors, be enjoined and restrained from discontinuing or causing to be discontinued or dismissed the said action and proceedings now pending on its behalf or in which it is interested, namely, the actions and proceedings in the nature of replevin now pending in the State of New York and in the State of Texas, for the recovery of said matte or the proceeds thereof, or to establish a lien thereon, and that they further be enjoined and restrained from discontinuing or causing to be dismissed the two suits, or either of them, now pending in the district court of the county of Maricopa, in the Territory of Arizona, and that they further be enjoined and restrained from discontinuing, abandoning or dismissing or causing to be dismissed any proceedings, actions or suits now pending on behalf of the Cobre Grande Copper Company in the Republic of Mexico or elsewhere for the recovery of the property, mines or property rights of the Cobre Grande Copper Company,

and that a mandatory injunction issue out of this court directing the said Cobre Grande Copper Company and the defendants, its officers, directors and agents, to faithfully prosecute and pursue in its behalf all actions and proceedings brought by any of the defendants herein for the recovery of said property or property rights, or any of the property or property rights of the said Cobre Grande Copper Company; that the plaintiff be brought in and made a party plaintiff to said actions and proceedings, as far as may be necessary to
16 protect his rights, and that it be ordered and adjudged that he have the right to intervene in said suits, actions and proceedings in Arizona, New York or Texas, and elsewhere, for the protection of his interests and those of all other persons similarly situated herein; that the defendants Gage, Adamson, Costello, Wood and O'Keefe be removed from their offices as directors, president and secretary respectively; that a receiver be appointed to take possession of the assests and property of the Cobre Grande Copper Company and to protect the same, and to prosecute the claims aforesaid, and to recover, protect and defend said properties, claims and demands from and against said Greene, Mitchell and their confederates and agents and the remaining defendant corporations herein, and to defend the said Cobre Grande Copper Company from the conspiracies and assaults of the said defendants and to operate said mines and mining properties and carry on the same; that the defendants Greene and Mitchell be restrained from demanding and receiving from Phœnix national bank, or other custodian thereof, the papers and documents constituting and evidencing the title to said properties and that the said defendant and Phœnix national bank be restrained from delivering said papers and documents to the said defendants Greene and Mitchell, or either of them, or to any other persons except the Cobre Grande Copper Company, or to said receiver, and that the time for the payment of the instalment of $37,500 and all other instalments under said contract for the purchase of said mining properties of said Cobre Grande Copper Company be extended to a reasonable time after it shall be restored to the possession of said mines and mining claims or to such other times as to the court may seem just; and that the defendants Greene, Mitchell, Cananea Consolidated Copper Company and the Greene Consolidated Copper Company be required to account to the defendant the Cobre Grande Copper Company for the property of said company, including the product of the mines, supplies and material taken or appropriated by them, or any of them, and be required to pay any
17 amount found due on such accounting, and that the plaintiff may have such other and further relief as may be just, together with costs and disbursements of this action.

JOHN J. HAWKINS,
Attorney for Plaintiff.

ATWATER & CRUIKSHANK,
Of Counsel.

Amended Answer, Cananea Consolidated Copper Co., Greene Consolidated Copper Co., and Wm. C. Greene.

(Same Title.)

Now, in this amended answer, comes the defendant, The Cananea Consolidated Copper Company, and says that, the said court has no jurisdiction over the defendant; that the defendant is a corporation organized under the laws of Mexico; that its assets are all in Mexico, and that it transacts no business in the Territory of Arizona, and has no agent in the Territory of Arizona, and there is no one in Arizona, upon whom process can be legally served, nor has there been, since the commencement of this action;

Wherefore, the said defendant prays, that this suit abate and that the said suit be dismissed as to this defendant.

By BARNES & MARTIN,
Its Attorneys in this Behalf.

And now as aforesaid also comes William C. Greene, The Greene Consolidated Copper Company and the said Cananea Consolidated Copper Company (if the foregoing plea to jurisdiction be overruled) and defendants say that the said complaint does not state facts sufficient to constitute a cause of action.

Wherefore they pray judgment according to law.

BARNES & MARTIN,
Attorneys for said Defendants.

18 And also demurring specially to the said complaint said defendants allege:

That the said complaint is multifarious and attempts to state divers and sundry causes of action against said several defendants, in one cause of action.

That the complainant seeks to base a cause of action upon the allegation that he has been injured as a stockholder of the Cobre Grande Company, and that the allegation and injury as aforesaid constitute a separate and distinct cause of action, and further in the same cause of action said plaintiff seeks to base his cause of action upon injuries which he alleges he has received as a creditor of the said Cobre Grande Copper Company, and that the same are two separate and distinct causes of action,

And further demurring said defendants contend that said complaint states no ground whatever for equitable relief or for any kind of relief such as he asks for, and upon the allegations of the complaint and facts alleged, the plaintiff has a plain, speedy and adequate remedy at law for each and every of the causes of action alleged by him. With reference to the cause of action as based upon the allegation that the plaintiff is a creditor of the said company, his allegations and prayer are in the nature of a creditor's

bill and a court of equity has no jurisdiction to grant any relief upon the facts alleged, unless there be the further allegation that the said plaintiff is a judgment creditor of the said company, and that he has failed to collect the same after having used reasonable diligence by the process of law.

Wherefore defendants pray judgment according to law.

BARNES & MARTIN,
Attorneys for said Defendants.

19 And also as aforesaid for answer to said complaint defendants and said Cananea Company (if the said plea of jurisdiction is overruled) come and say:

That they deny each and every of the material allegations of said complaint. They deny that the plaintiff is a stockholder of the said defendant Cobre Grande Copper Company; they deny that the said plaintiff is a creditor of the said Cobre Grande Copper Company, and deny that the said company is indebted to the said plaintiff as alleged, or at all. Defendants deny all the allegations of the said complaint as to fraud or fraudulent conspiracy in any manner or form whatever as alleged, or at all. Defendants deny that the said Cobre Grande Copper Company, is, or ever was, the owner of the mining ground alleged in the complaint, and deny that said company was ever entitled to the possession of the same.

And further answering the said complaint, defendants allege that the indebtedness alleged in said complaint, was made for no good and lawful consideration whatever; that if the said notes were executed as alleged and money advanced as alleged, it was for a legal and champertous purpose to aid and abet litigation and controversy, in which plaintiff had no interest whatever and for stock jobbing purposes, in order that he might purchase stock of the defendant, The Greene Consolidated Copper Company, at a less price than it was selling for in the market, and that the said consideration is void for The same reasons as against public policy, and the court will not render any aid or assistance to the plaintiff by its process or procedure, for money advanced or loaned for such illegal and champertous purposes.

And further answering said complaint, defendants allege that they are informed and believe, and therefore state the fact to be, that the said Cobre Grande Copper Company, long since paid to the plaintiff all of the said indebtedness alleged in said complaint, all of which foregoing defenses the said defendants are ready to
20 verify, and wherefore they pray judgment that the complaint be dismissed at plaintiff's costs.

BARNES & MARTIN,
Attorneys for Defendants.

And further answering said complaint, defendants allege that as alleged in paragraph III of the original complaint filed herein, there was filed and instituted in the district court of the third judicial dis-

trict of the Territory of Arizona, in and for the county of Maricopa, and on the 25th day of November, 1899, a certain suit, wherein The Cobre Grande Copper Company was plaintiff and William C. Greene, George Mitchell and The Phœnix National Bank of Phœnix, Arizona Territory, were defendants, which said suit was numbered 3437 upon the docket of said court, and in which said suit the Cobre Grande Copper Company alleged in substance all of the allegations of fact set forth in paragraph III. of the original complaint filed in this cause; that answers were filed to the said suits by the said defendants and issue joined thereon. That the said cause proceeded to trial on the issues involved, large numbers of witnesses were called and the trial of said cause consumed from six to ten days of the uninterrupted proceedings of said court, and the cause was finally submitted to the said court for a decision, and that afterwards the court having fully considered the said cause and the allegations in the complaint, found the issues for the defendants, found that the said Cobre Grande Copper Company had not performed the conditions of its contracts set forth, and had forfeited all its rights and titles under and by virtue of the contract alleged between said Greene and said Mitchell, and assigned to said Cobre Grande Copper Company, and the supplemental contract of the said Greene with the said Cobre Grande Copper Company as alleged in said paragraph III and in said complaint; found that the said Greene had not wrongfully taken possession of said property, and that the said company had failed to perform the conditions of its contract to pay the pur-
21 chase price for the said mining ground alleged, by no fault or wrong of the said Greene, and ordered and directed that the injunction enjoining the bank from delivering the contracts alleged in said complaint and in said paragraph III, be dissolved, and that the bank defendant be ordered to deliver the said escrow contracts and papers in its hands to the said Greene, for the reason that the said Cobre Grande Grande Copper Company had forfeited all of its rights thereunder.

That a duly authenticated record and transcript of the said proceedings of said court will be presented to the court in this cause, due proffert thereof hereby being made, and that the said proceeding is a bar to and complete denial of all the matters and things alleged as a basis of a cause of action in paragraph III of the original complaint filed herein, and this court has no authority or power to try or consider the same, as this plaintiff herein is barred thereby, as well as the Cobre Grande Copper Company aforesaid for the reason that the plaintiff is a stockholder of said company and the bar aforesaid against the said Cobre Grande Copper Company bars this plaintiff as a stockholder of this company as well, all of which these defendants are ready to verify.

Wherefore they pray judgment accordingly.

BARNES & MARTIN,
Attorneys for said Defendants.

And further answering said complaint, and particularly paragraph III thereof, defendants allege that on, viz: the 31st day of January, A. D. 1900, there was commenced in the thirty-fourth judicial district of the State of Texas, holding sessions in El Paso county of said State, a certain suit wherein the defendant, The Cobre Grande Copper Company was plaintiff, and William C. Greene, George Mitchell, George A. Treadwell and Win Wylie were defendants; a certain suit (the suit being the suit in El Paso, in the complaint aforesaid mentioned) in which the plaintiff alleged in substance all of the allegations set forth in paragraph III of the
22 original complaint filed in this case, and among other things alleged, that the said plaintiff was entitled to the possession of the mining ground in the complaint herein described, and the right to extract ores therefrom, and to market the same, and alleging that the defendant Greene and others had wilfully and without right forcibly deprived said Cobre Grande Company of the possession of the said mining grounds, and had extracted ores therefrom, and had converted the same into matte and had shipped the same to the said county of El Paso; alleging that the proceeds of the same were then in the possession of the co-defendant, The Consolidated Kansas City Smelting and Refining Company, and alleging that the same was of a value of about nine thousand dollars, and that the same was the property of the said Cobre Grande Copper Company by means of the premises alleged as aforesaid, and demanded judgment against the defendants for the proceeds of the said matte so made from ores so wrongfully extracted or manufactured from said mining ground aforesaid.

That the issues were made upon said complaint, the said defendant Greene and his co-defendants answering that the said Cobre Grande Copper Company was not the owner, nor entitled lawfully to the mining ground aforesaid, and that the said defendant Greene and parties claiming under, by and through him, had extracted ores from said mining ground and manufactured the same into matte and shipped the same to El Paso rightfully, and that the same was the property of said defendant Greene and parties claiming under, by and through him, to wit, the Consolidated National Bank of Tucson, and that the said bank was the owner of said matte and possessed thereof.

That the issues were joined by all the parties therein as aforesai d, and the said issues were submitted to a jury for trial, and that after a full hearing thereof lasting for several days and evidence submitted before the court and argument thereunder, and upon such evi-
23 dence, arguments and instructions of the court, said case was submitted to the jury, and the jury found the issues against the plaintiff and in favor of the co-defendant, The Consolidated National Bank, as an assignee and privy to the rights of the said co-defendant Greene, and that the said bank derived its title to the said matte rightfully, and that said Greene had the right to extract ores and manufacture matte as against the rights of the

plaintiff; and the defendants aver that the court thereupon rendered judgment against the plaintiff and in favor of the Consolidated National Bank upon its cross-appeal, asking that judgment be rendered in its favor against the said smelter company for the value of said matte, to wit: for the sum of nine thousand dollars; and the court found that the said Cobre Grande Copper Company had not performed the condition of its contract set forth, to wit: the contract between Mitchell and Greene of the 29th day of November, 1898, and assigned to the said Cobre Grande Copper Company, and the supplemental contract thereunder set forth in the complaint herein, and also found that the said Cobre Grande Copper Company had forfeited all its rights under and by virtue of a contract alleged and supplemental contract thereto as aforesaid and as alleged and set forth in paragraph III of said complaint, and found that the said Greene had not wrongfully taken possession of said property and found that the said co-defendant failed to perform the conditions of its contract to pay the purchase price for said mining ground as alleged, by no fault or wrong of the said defendant Greene, and found that the said Cobre Grande Copper Company had forfeited all its rights under and by virtue of said contract, all of which defendants are ready to verify.

That a duly authenticated record and transcript of the said proceedings of the said court will be presented to the court in this cause, due proffert thereof being hereby made, and defendants allege that the said proceeding is a bar to and complete denial of all the matters and things alleged as a basis of a cause of action in paragraph III of the original complaint filed herein, and this court has no authority or power to try or to consider the same, as this plaintiff herein is barred thereby, as well as the Cobre Grande Copper Company aforesaid, for the reason that this plaintiff is a stockholder of said company, and the bar aforesaid against the Cobre Grande Copper Company, bars this plaintiff as a stockholder of said company as well, all of which defendants are ready to verify.

Wherefore, they pray judgment accordingly.

BARNES & MARTIN,
Attorneys for said Defendants.

And further answering said complaint, and particularly paragraph IV of the original complaint filed herein:

The defendants allege that the contract alleged in said cause as having been made on the 12th day of December, 1900, and which is alleged to have been entered into fraudulently and as the result of the fraudulent conspiracy between the defendants in this cause, was entered into on or about the date alleged and was the result of several days' negotiations as to its terms and conditions; that prior to that time 115,000 shares of the stock of the Cobre Grande Copper Company had been placed in the hands of E. B. Gage, co-defendant herein, as a trustee, with full power and authority by him and on his part to act for all the beneficiaries of said trust; that among the

beneficiaries was this plaintiff Hallenborg, who placed in the hands of said Gage, under and by virtue of the said trust, 8,000 shares of the stock of the corporation, and that at the time of the negotiations as aforesaid, all said stock of the said Hallenborg was in the hands of said Gage; that by virtue of the provisions of the contract of trust by which the co-defendant Gage held the said stock, the said Gage was made attorney in fact for all the beneficiaries of said trust, including the said Hallenborg, and he was authorized to sell, transfer and deliver all of said stock so put in his hands, at such
25 price and upon such terms as he might see proper, fully authorizing him and confirming him as the attorney in fact of all the owners of said stock; that there were in the neighborhood of twenty or more owners of stock beside the said plaintiff; that some of them and the most of them were not present during said negotiations and had no knowledge thereof, and, therefore, it was provided in said contract, among other things, that any of the stockholders named in said trust "may withdraw their stock from this agreement," to wit: the agreement of December 12th, 1900, "if they so wished to do," but the said defendants allege that the said Hallenborg was, in the person of and by his attorney in fact and his attorney at law, duly authorized and representing him, to wit: one Grant Bennett, present in Phœnix at the time the negotiations which led up to the said contract of December 12th, was present at all conferences and consultations with reference thereto, between the said Gage and his representatives and the said Greene, acting for the Greene Consolidated Copper Company, and also in all consultations between the said Gage and the beneficiaries of the trust in his hands, and that he had full knowledge of all the negotiations as they progressed, suggested changes and modifications of the terms of the contract, all of which were complied with, and that he, the said Bennett, was during the negotiations in telegraphic communication with the said plaintiff, and said plaintiff was fully informed of all the negotiations; that the said Bennett fully, unequivocally approved of the same, and but for his approval on behalf of the plaintiff for whom he had authority to act, the said Greene would not have executed said contract, and same would not have been executed, and by reason and by virtue and in consideration of the approval and consent of the said attorney, on December 12th, 1900, the said contract was executed on behalf of the said Greene, and fifty cents per share for 115,000 shares, the first payment therefor as provided in said contract was paid to said Gage, for which $4,000 was paid to said Gage, for and on behalf of this plaintiff, and with the
26 knowledge and with the approval and the consent and complete ratification and endorsement of the said plaintiff by and through his attorney in fact and attorney at law, the said Grant Bennett; that thereby the first consideration in the performance of the said contract was executed by said Greene, and he was induced by the said plaintiff, and by his said attorney, to pay over to said Gage more than fifty thousand dollars in cash for the benefit of the

beneficiaries of said contract, four thousand dollars of which was paid for the benefit of said Hallenborg, and thereby said Hallenborg became a party to and bound by the terms of said contract so entered into and executed on the 12th day of December, 1900, and thereby said Greene was induced and thereafter performed all the conditions of the said contract, paid to the said Gage the full amount of two dollars and fifty cents per share for said stock, as provided for in said contract, and all the other terms and conditions of said contract were performed by said Greene, and the said contract having been executed and having been partly performed by the said Greene, with the knowledge, consent and approval of the said Hallenborg by his attorney in fact and attorney at law, as aforesaid; the said Hallenborg is estopped now to repudiate, and to deny, repudiate and prevent the execution of the said contract, on the part of the said Gage, and that the repudiation of said contract by the said Hallenborg is a loss to the said Greene of the benefits of said contract, and after he had partly executed the same.

And by way of set-off and reconvention authorized by law, the defendants allege that the repudiation of said contract and the violation of its terms by the said Hallenborg, is a breach of the contract by said Hallenborg, and by said breach of said contract and repudiation thereof by said Hallenborg, the defendants have been injured and damaged in a large sum, to wit: the sum of more than one hundred thousand dollars, for which they pray judgment according to law.

BARNES & MARTIN,
Attorneys for Defendants.

27 And further answering the said complaint and re-affirming and re-alleging as a part of this sub-division of the foregoing allegation of this answer, the defendants allege that after the contract had been partly executed by said Greene by the payment of fifty cents per share for 415,000 shares of stock as aforesaid, the said Hallenborg, in repudiation of and in violation of his contract, ratified and confirmed on December 12th, 1900, as aforesaid, appeared in the said court in Maricopa county, in said cause, after the same had been submitted for the decision of the judge of said court, and contrary to law, and asked to be allowed to intervene in said cause and set up and allege all the matters and things set forth in paragraph III of the original complaint herein, alleged fraud and fraudulent conspiracy on the part of the parties to said contract alleged as aforesaid; that the said Cobre Grande Copper Company had been defrauded of its rights of property; alleged that the said Cobre Grande Copper Company was the owner of mining lands in Mexico, when the said plaintiff knew that the said company did not own and never had owned any mining lands or mining grounds in Mexico or elsewhere; falsely alleging that all of the mining ground which was owned or claimed to be owned by defendant Greene Consolidated Copper Company was really and in fact owned by the said Cobre

Grande Copper Company, and that by the fraudulent conspiracy set forth in paragraph III the said Cobre Grande Copper Company had been deprived of its rights in Mexico. And alleged also as alleged in this complaint, substantially all the allegations as alleged in this complaint. And having filed the said petition for intervention, he caused the same to be published far and wide in newspapers throughout the country, and that the said petition for intervention was not made in good faith, but for the purpose of publishing throughout the country the allegations of said complaint. That the said suit was commenced not in good faith for the purpose of enforcing any rights, but for the purpose of "bearing" the stocks of the
28 Greene Consolidated Copper Company and the value thereof in order that he might purchase the same for a less price, and that the suit was brought for the purpose of publishing to the public throughout the country and to the knowledge of proposed purchasers of the stock of the defendant Greene Consolidated Copper Company, for the purpose of injuring the said company and the defendant Greene, and that the said proceeding was followed afterwards by this suit for the same purpose and that another suit was brought in New York, in which the same allegations are made; that all of these suits were from time to time heralded throughout the country in the newspapers, their publication was paid for and purchased by the said plaintiff, and the same were brought by the plaintiff to injure the stock and the values of the stock of the Greene Consolidated Copper Company to the injury of said company and of said Greene; that same was a slander upon the title to the real estate owned and operated by the said Greene Consolidated Copper Company, and the said Greene Consolidated Copper Company is a mining company operating large and extensive mines in Mexico and its stocks have great value, and that the market value of the same has been injured and lessened and proposed purchasers have been induced not to do so by the machinations and publications of said Hallenborg, whereby by this suit and the other suits aforesaid, and the publication thereof as aforesaid, these defendants have been injured and damaged in a large sum of money, to wit: a sum in excess of one hundred thousand dollars.

Wherefore, they pray judgment by way of set-off and recoupment, according to law, and all the allegations aforesaid they are ready to verify.

BARNES & MARTIN,
Attorneys for Defendants.

And further by way of set-off and reconvention, said defendants allege that the said plaintiff as a stockholder of the said Cobre Grande Copper Company and the said Cobre Grande Copper
29 Company do not own and never have owned any real estate or mining grounds in Mexico or anywhere else. That the said Cobre Grande Copper Company had a contract by which it had the right to purchase mining grounds in Mexico as alleged, that

deeds for the conveyance of the same were placed in escrow to be delivered upon the payment of the purchase price, and that the purchase price has not been paid, and that all the rights, interests, title, claim or equity of the said Cobre Grande Copper Company and of the said plaintiff as a stockholder thereof have been lost and forfeited by its own failure to perform the conditions of said escrow contracts. That the claim and assertion of claim to own the mining grounds and real estate hereinbefore described is a cloud upon the title of the Greene Consolidated Copper Company in and to the lands and mining grounds included in the said escrow contracts aforesaid, and that the assertion of said claim of right is an injury as aforesaid to the rights and interest of the said Greene Consolidated Copper Company. That the claim of title to the right, interest or ownership in and to the said lands and mining grounds which have since been acquired from the said Greene by conveyance by the said Greene Consolidated Copper Company, is without right and without equity. That in a certain cause, to wit: the said cause hereinbefore referred to as suit No. 3437 in the district court of Maricopa county, Territory of Arizona, all the rights of the said Cobre Grande Copper Company were fully and completely adjudicated, and all claim of right and title of the said Cobre Grande Copper Company was adjudicated to be lost and forfeited, and by said adjudication it was decreed that the said Cobre Grande Copper Company has no right, title or interest in or to the said lands or mining grounds.

Wherefore, defendants pray that by an affirmative decree of this court and as a separate and distinct relief in favor of the defendants, that the court decree and adjudge that the said Cobre Grande Copper Company have no right, title or interest or equity in and to the mining ground and lands so described and that upon the final hearing of this case the said Hallenborg be enjoined perpetually from setting up and asserting any claim, right, title, interest or equity thereto.

And upon the allegations hereof the said defendants pray for such other and further relief as law affords and equity provides.

BARNES & MARTIN,
Attorneys for said Defendants.

(Same Title.)

The several answer of John H. Costello, one of the defendants in the above cause to the complaint filed in this cause, respectfully show:

That he admits the several allegations contained in divisions I to III, inclusive, of said complaint.

That answering to the fourth division of said complaint, this defendant admits that prior to and about the 12th day of December, 1900, the said Greene, the Greene Consolidated Copper Company and their associates sought to secure the control and management of said Cobre Grande Copper Company, but whether the

purpose was, as alleged, to stop litigation and secure undisputed possession of the mines, this defendant has not sufficient knowledge to affirm or deny, and therefore leaves the plaintiff to his proofs; nor has he any knowledge that the parties thus securing control of said Cobre Grande Company anticipated an unfavorable decision in pending suits; nor has he any knowledge of the Greene consolidated stock selling upon the market at $10 per share; nor has he any knowledge of the entering into a fraudulent and corrupt conspiracy on the part of said Gage and the other directors of the Cobre Grande Copper Company with the said Greene and the Greene Consolidated Copper Company; that so far as this defendant had to do with the said contract as director of the said Cobre
31 Grande Copper Company, or individually, his acts were not fraudulent, corrupt or in pursuance of any conspiracy as alleged, or otherwise.

He admits said Gage, as trustee, held the shares of the stock, as charged, with power to dispose of the same, and that said Greene and the Greene Consolidated Copper Company agreed to buy said 115,049 shares, which was the majority shares of stock of said company, at $2.50 per share, and that upon payment in full of the same this defendant, with the other directors of the said Cobre Grande Copper Company agreed to resign as such directors and allow the purchasers of said stock to elect their own directors and officers, and thus allow the new management to conduct its business as it saw fit, and which would include the right to dismiss all pending suits. Admits that Gage was to receive 5,000 shares of the Greene consolidated stock as a personal benefit and that the note of this defendant for $23,000 was to be surrendered to him by the said Cobre Grande Copper Company.

This defendant has no knowledge or information in respect to the allegation, made on information and belief, that there was some secret compact with said directors Adamson, Wood and O'Keefe, by which they were to receive large personal gain from said Greene or from the Greene Consolidated Company on account of the part they took as directors in the execution and carrying out of said contract of December 12th, 1900.

This defendant admits that said contract of December 12th was made by said Gage, acting as presidens of the said Cobre Grande Copper Company and as trustee for said 115,049 shares of stock, and was done with the consent of said directors; admits that thereafter said directors, this defendant acting with them, as such directors, held a meeting of said Cobre Grande Copper Company and did assume to ratify, and did so ratify, said agreement on behalf of said company, and he admits it was their purpose to carry out said agreement in all respects as in said contract provided, and had said Greene and the Greene Consolidated Copper Company carried
32 out their part of said contract, this defendant and others for whom said Gage was acting, as trustee in executing said agreement, would have carried out and stood by the same.

This defendant denies that said agreement and the whole thereof was illegal and fraudulent as to the plaintiff and others similarly situated, and the intent and design was to prevent the enforcement of the just claims and demands of said Cobre Grande Copper Company against said Greene and the Greene Consolidated Company.

Further answering to the fifth division of said complaint, this defendant admits that the said mines and mining claims in Mexico concerning which said litigation was pending when said contract of December 12th, 1900, was entered into, constituted the sole property of the said Cobre Grande Copper Company, and should it fail in its efforts to recover the same, it would have no assets with which to pay its creditors, but this defendant alleges that such fact was no concern of his in making sale of his stock in said Cobre Grande Copper Company. He admits said mines and mining claims were of very large value and that said plaintiff purchased his stock therein and advanced the money claimed by him to have done in his complaint.

Further answering, this defendant denies each and every allegation in said complaint contained charging any conspiracy, collusion or corruption on his part, or any intent whatever to injure the plaintiff or or others in like situation in securing their just rights and claims against said Cobre Grande Copper Company.

This defendant therefore asks to have said complaint dismissed and for costs as to him.

(Signed) J. M. JAMISON,
Attorney for Defendant Costello.

TERRITORY OF ARIZONA, }
County of Maricopa, } ss:

On this 25th day of February, 1902, personally appeared J. M. Jamison, known to me to be the person who signed the fore-
33 going answer as attorney for said Costello, and made oath that he had read the same and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated to be on information and belief, and as to those matters he believes it to be true; that he makes this affidavit in behalf of said Costello for the reason said Costello is absent from the Territory and in the State of New York and that he is so authorized so to do as the agent of said Costello.

(Signed) GEORGE D. CHRISTY,
[L. S.] Notary Public.

My commission expires August 24th, 1905.
Filed May 12th, 1902, at 10 o'clock a. m.

J. M. WATTS, Clerk.

Answer of George Mitchell.

(Same Title.)

Comes now the above named defendant, George Mitchell, and for himself alone defending said action, states that said complaint does not allege facts sufficient to constitute a cause of action.

Wherefore, he prays judgment as to the sufficiency of said complaint.

R. E. MORRISON,
Attorney for Defendant Mitchell.

And specially demurring, defendant alleges that said complaint is multifarious in this, to-wit, that it attempts to state sundry causes of action against the several defendants which cannot be united.

And further specially demurring, defendant says the said complaint does not state facts entitling plaintiff to any equitable relief or any relief of any kind.

And further specially demurring, states that the allegations contained in said complaint show that plaintiff has a speedy and
34 adequate remedy at law for any and every of the causes of action alleged in said complaint.

Further demurring specially as to the cause of action based upon an alleged indebtedness, the complaint does not show that said alleged claim has been reduced to judgment, and such a claim cannot be the basis of a complaint of this sort until the same has been reduced to judgment.

Wherefore, defendant prays judgment as to the sufficiency of said complaint.

R. E. MORRISON,
Attorney for Defendant Mitchell.

And for a further, separate and other answer, defendant Mitchell says that he denies each and every, all and singular the material allegations in said complaint contained.

He denies all of the allegations in said complaint contained of fraud and fraudulent conspiracy, and as alleged or at all, but states the fact to be that said agreement of December 12, 1900, was made with plaintiff's full knowledge and consent and acquiescence, he being represented by his attorney at all of the meetings at which said contract was made. And that by the terms of said contract of December 12, 1900, the said alleged claims of indebtedness against the Cobre Grande Copper Company were provided for and payment thereof agreed to.

Wherefore, said defendant prays judgment that said complaint be dismissed and that defendant go hence without *delay* and with his costs.

ROB'T E. MORRISON,
Attorney for Defendant Mitchell.

35 (Same Title.)

Come now E. B. Gage, W. M. Adamson, J. Henry Wood, Con. O'Keefe, the Phœnix National Bank and the Cobre Grande Copper Company, for themselves and each of them severally, and not for their co-defendants, and file this their second amended answer to the complaint of plaintiff herein:

First. By way of demurrer, these defendants allege that the complaint fails to state facts sufficient to constitute a cause of action against them or either of them.

Wherefore they pray the judgment of the court as to the sufficiency of said complaint and that they may go hence with their costs.

BEN GOODRICH,
HERNDON & NORRIS,
L. H. CHALMERS,
Attorneys for Answering Defendants.

These defendants further answering say:

That there was filed and instituted in the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, on the —day of —— a certain suit wherein The Cobre Grande Copper Company was plaintiff and William C. Greene, George Mitchell and The Phœnix National Bank were defendants. Said suit was numbered 3437 upon the docket of said court; and upon which said suit the Cobre Grande Copper Company alleged, among other things, in substance all the facts set forth in paragraph three of the original complaint on file in this action, and further prayed that the said Greene be required to account to the said Cobre Grande Copper Company for the proceeds of the product of said mines and mining claims, together with the supplies, material and property of said Cobre Grande Copper Company, taken and appropriated by him.

That answers thereto were filed by said defendants and issues joined thereon.

36 That said cause proceeded to trial on the issues involved and the cause was finally submitted to said court for a decision and judgment; and that afterwards the said court having fully considered the said cause and the allegations and the evidence, found the issues for the defendants, and found that said Cobre Grande Copper Company had not performed the conditions of its contract set forth in said action, and in the third paragraph of the originial complaint in this action, and had forfeited all its rights and titles under and by virtue of the contract alleged between said Greene and said Mitchell, and assigned to said Cobre Grande Copper Company by said Mitchell, and the supplemental contract of said Greene with said Cobre Grande Copper Company, as alleged in said paragraph three of the complaint in this action; and also found that the said William C. Greene had not wrongfully taken possession

of the property, but that the said Cobre Grande Copper Company had failed to perform the conditions of its contract to pay the purchase price for the said mining properties by any fault or wrong of the said Greene; and duly gave and made a judgment in said cause in accordance with said findings and ordered, directed, adjudged and decreed that the temporary injunction enjoining the Phœnix National Bank from delivering the contracts, deeds and papers held in escrow by it, mentioned in said complaint and in said paragraph three of the original complaint in this action, be dissolved and that the said Phœnix National Bank, defendant, be ordered to deliver the said escrow contracts, deeds and papers in its custody to the said Greene, for the reason that the said Cobre Grande Copper Company had forfeited all of its rights thereunder, and denied plaintiff's prayer for an accounting against said Greene.

And said defendants further allege: that said judgment so rendered by said court is in full force and effect and has not been appealed from, nor taken up to the appellate court of the Territory, by any writ of error or any other proceedings; and they here plead the same in bar of plaintiff's right to sue or recover in this ac-
37 tion, and further as a complete defense to plaintiff's action herein.

And these defendants further say: that at the time said judgment and decree was rendered and for a long time prior thereto, the plaintiff herein was a stockholder in said Cobre Grande Copper Company, and that the judgment against said Cobre Grande Copper Company is binding and conclusive against the said plaintiff by reason thereof.

And further answering said complaint, and particularly paragraph III thereof, defendants allege that on, viz: the 31st day of January, A. D. 1900, there was commenced in the thirty-fourth judicial district of the State of Texas, holding sessions in El Paso county of said State, a certain suit wherein the defendant, The Cobre Grande Copper Company, was plaintiff, and William C. Greene, George Mitchell, George A. Treadwell and Win Wylie were defendants; a certain suit (the suit being the suit in El Paso, in the complaint aforesaid mentioned), in which the plaintiff alleged in substance all of the allegations set forth in paragraph III of the original complaint filed in this case, and among other things alleged, that the said plaintiff was entitled to the possession of the mining ground in the complaint herein described, and the right to extract ores therefrom, and to market the same, and alleging that the defendant Greene and others had wilfully and without right forcibly deprived said Cobre Grande Company of the possession of the said mining grounds, and had extracted ores therefrom, and had converted the same into matte and had shipped the same to the said county of El Paso; alleging that the proceeds of the same were then in the possession of the co-defendant, The Consolidated Kansas City Smelting and Refining Company, and alleging that the same was of a value of about nine thousand dollars, and that the same was the property

of the said Cobre Grande Copper Company by means of the premises alleged as aforesaid, and demanded judgment against the defendants for the proceeds of the said matte so made from ores so
38 wrongfully extracted and manufactured from said mining ground aforesaid.

That the issues were made upon said complaint, the said defendant Greene and his co-defendants answering that the said Cobre Grande Copper Company was not the owner, nor entitled lawfully to the mining ground aforesaid, and that the said defendant Greene and parties claiming under, by and through him had extracted ores from said mining ground and manufactured the same into matte and shipped the same to El Paso rightfully and that the same was the property of said defendant Greene and parties claiming under, by and through him, to wit: the Consolidated National Bank of Tucson, and that the said bank was the owner of said matte and possessed thereof.

That the issues were joined by all the parties therein as aforesaid, and the said issues were submitted to a jury for trial, and that after a full hearing thereof lasting for several days and evidence submitted before the court and argument thereunder, and upon such evidence, arguments and instructions of the court said case was submitted to the jury, and the jury found the issues against the plaintiff and in favor of the co-defendant, The Consolidated National Bank, as an assignee and privy to the rights of the said co-defendant Greene, and that the said bank derived its title to the said matte rightfully, and that said Greene had the right to extract ores and manufacture matte as against the rights of the plaintiff; and the defendants aver that the court thereupon rendered judgment against the plaintiff and in favor of the Consolidated National Bank upon its cross-appeal, asking that judgment be rendered in its favor against the said smelter company for the value of said matte, to wit: for the sum of nine thousand dollars; and the court found that the said Cobre Grande Copper Company had not performed the conditions of its contract set forth, to wit: the contract between Mitchell and Greene of the 29th day of November, 1898, and assigned to the said Cobre Grande Copper Company, and the supplemental contract thereunder set forth in the complaint herein, and also found that the said
39 Cobre Grande Copper Company had forfeited all its right under and by virtue of a contract alleged and supplemental contract thereto as aforesaid and as alleged and set forth in paragraph III of said complaint and found that the said Greene had not wrongfully taken possession of said property and found that the said co-defendant failed to perform the conditions of its contract to pay the purchase price for said mining ground as alleged, by no fault or wrong of the said defendant Greene, and found that the said Cobre Grande Copper Company had forfeited all its rights under and by virtue of said contract, all of which defendants are ready to verify.

That a duly authenticated record and transcript of the said proceedings of the said court will be presented to the court in this

cause, due proffert thereof being hereby made, and defendants allege that the said proceedings is a bar to and complete denial of all the matters and things alleged as a basis of a cause of action in paragraph III of the original complaint filed herein, and this court has no authority or power to try or to consider the same, as this plaintiff herein is barred thereby, as well as the Cobre Grande Copper Company aforesaid, for the reason that this plaintiff is a stockholder of said company and the bar aforesaid against the Cobre Grande Copper Company, bars this plaintiff as a stockholder of said company as well, all of which defendants are ready to verify.

Wherefore they pray judgment accordingly.

These defendants further answering said complaint, deny each and every allegation in said complaint contained and in plaintiff's supplemental complaint contained, except as may be hereinafter specifically admitted.

Further answering said complaint, these defendants admit that E. B. Gage has been a director and president of said Cobre Grande Copper Company from November 14th, 1899, up to the third day of April, 1901, at which time he resigned as such director and president and his resignation was accepted; and since that time he has not been connected with said corporation.

40 These defendants admit that the defendants W. M. Adamson, John H. Costello, J. Henry Wood and Con. O'Keefe were directors of said Cobre Grande Copper Company from November 27th, 1900, until the third day of April, 1901, at which time they resigned their said positions as directors, and their successors were elected and qualified.

II.

Further answering said complaint, these defendants say: that about the month of November, 1898, and prior thereto, William C. Greene owned certain property in Sonora, Mexico, and had options to purchase other property there.

That in the said month of November, 1898, said Greene executed an option on the property then owned by him in Sonora and the other property for which he had contracts to purchase, to George Mitchell. That said contract provided that Mitchell should pay in cash at the execution of said contract twelve thousand five hundred dollars ($12,500.00), and two hundred and thirty-seven thousand five hundred dollars ($237,500.00) as follows: Thirty-seven thousand five hundred dollars ($37,500.00) to be paid on or before the 26th day of November, 1899; one hundred thousand dollars ($100,000.00) on or before the 26th of November, 1900; and one hundred thousand dollars ($100,000) on or before the 26th November, 1901.

That thereafterwards, about the month of April, 1899, Greene and Mitchell, with the assistance of other parties, created and organized the Cobre Grande Copper Company under the laws of Arizona. The stock of the company, two hundred thousand shares, of the par value of $2.50 each, was turned over to Mitchell in consideration of

his contract with Greene, which said contract between Greene and Mitchell was assigned to the Cobre Grande Copper Company, subject to the rights of said Greene therein.

41 Thereupon the Cobre Grande Copper Company entered into and upon said property and began to operate the same.

That afterwards, to wit: on or about the month of October, 1899, controversies arose between the Cobre Grande Copper Company and William C. Greene over said contract and their right of possession of said mining property; and that on or about that time Greene entered into possession of said property.

Thereupon the Cobre Grande Copper Company instituted a suit, through its attorneys, in the courts of Mexico, to regain possession of said property, and also instituted a suit in the district court of Maricopa county, Arizona, to restrain the delivery to said Greene of the deeds which were put in escrow under said contract with Mitchell and thereafter assigned to the Cobre Grande Copper Company.

That under the last named suits a temporary injunction was granted restraining said bank as the escrow agent of the parties, from delivering said escrow papers, and also restraining Greene from demanding the same from the said bank.

III.

That while said litigation was in progress, the Cobre Grande Copper Company was greatly embarrassed for the lack of funds with which to carry on said litigation, and in order to protect themselves, the stockholders of the Cobre Grande Copper Company, or a majority thereof, comprising stockholders to the extent of 115,049 shares or thereabouts, entered into a pooling arrangement or agreement, whereby all of their stock, to wit: one hundred and fifteen thousand and forty-nine shares, was delivered to E. B. Gage with the power to vote the same at the annual meeting of the stockholders.

IV.

That after said stock was pooled, and while the said pooling contract was in force, the stockholders therein represented granted

42 to E. B. Gage, who held said stock under said pool, the right to dispose of and sell said stock. And that afterwards on the fifth day of January, 1900, the said E. B. Gage, as trustee, made and entered into a contract with one Benjamin Orne for the sale of said stock at $2.50 per share; a copy of which said contract is attached to the first amended answer herein, marked Exhibit "2," and made part of this answer. (Shown in this record as Defendants' Exhibit C, Pooling Contract, June 5, 1900, page 7.)

V.

That said Orne failed to carry out the terms of said option on his part, and failed to purchase said stock.

That the Cobre Grande Copper Company was without funds, and

involved in litigation as aforesaid; and that afterwards, for the purpose of carrying on said litigation, to wit: on the 30th day of March, 1900, the said E. B. Gage, trustee for said stock, and with the power to sell and dispose of the same, entered into an agreement with L. H. Chalmers, agent for the sale of one hundred thousand one hundred shares (100,100) of the said Cobre Grande Copper Company stock at the price and sum of $2.50 per share, a copy of which said contract is attached to their first amended answer, marked Exhibit "3," and made a part hereof. (Shown in this record as Defendants' Exhibit D, Pooling Contract, March 30th, 1900, page —.)

That in said contract the said L. H. Chalmers was acting as agent for Samuel Untermeyer of the city of New York; or in case said Samuel Untermeyer refused to carry out the terms of said option, then such responsibile party or parties as might be named by one James Shirley.

As part of the consideration for this contract or option to said Chalmers as such agent, he, the said Chalmers, agreed to furnish the necessary money for carrying on said litigation.

That said contract with said Chalmers lapsed on account of
43 his failure and the failure of those whom he represented, to furnish money to carry on said litigation and to purchase said stock.

That thereafterwards on the second day of June, 1900, the said E. B. Gage, for the purpose of raising funds for carrying on said litigation on behalf of said stockholders, entered into a second agreement with the said Chalmers as agent for the sale of one hundred thousand one hundred shares (100,100) of the capital stock of said corporation, being the stock then in his hands as trustee as aforesaid, two hundred and fifty dollars ($250.00) upon the terms at the price and sum of two hundred and fifty thousand dollars and conditions named in said option, a copy of which said option is attached to their first amended answer marked Exhibit "4" and made part of this answer. (Shown in this record as Defendants' Exhibit Pooling Contract, June 2d, 1900, page —.)

That on the same day said Chalmers made written declarations that he was acting as agent in said contract for one William H. Dowe of New York city, and his representatives; and on the same day the said William H. Dowe declared in writing that he was acting for and representing John H. Costello, Axel W. Hallenborg, Henry H. Adams, James Shirley and Senator William F. Deboe. That in consideration for this option said parties purchased, to wit, about sixteen thousand (16,000) shares of the stock of the Cobre Grande Copper Company, held by E. B. Gage as trustee, and paid therefor $2.50 per share.

VI.

The said contract was not complied with on the part of said Chalmers and those whom he represented as agent; but was forfeited

and permitted to lapse by the parties for whom said Chalmers was acting as agent, among whom was the said Hallenborg.

VII.

That during all the time aforesaid the said litigation was
44 in progress. Debts had accumulated against the Cobre Grande Copper Company and were continuing to accumulate. Thereupon the said Gage undertook to negotiate another contract or option for the sale of said stock for the purpose of raising money to carry on said litigation and to pay the debts of the Cobre Grande Copper Company.

That A. W. Hallenborg, the plaintiff herein, and John H. Costello, opened negotiation with the said Gage and undertook to procure an option from him for the purchase of said stock at $2.50 per share.

That Grant R. Bennett, representing himself to be an attorney in the city of New York, and armed with a power of attorney from the said Hallenborg, came to Phœnix and personally opened negotiations in behalf of said Hallenborg to procure an option for the purchase of the stock then held in pool by the said Gage. That said J. H. Costello was personally present during this time. That this occurred about the month of October, 1900. That various contracts were drawn up and submitted for the consideration of the parties trying to effect a deal. And these defendants herewith submit to the court a form of contract which was drawn agreeable to and in conformity with the views and agreement as expressed by the plaintiff through his said attorney, Grant R. Bennett.

That said form of contract is attached to their first amended answer, marked Exhibit "5" (shown in this record as Defendants' Exhibit Pooling Contract, unexecuted, page —), and asked to be taken and read as part hereof. That the same was consented to by said Hallenborg and by his attorney Grant R. Bennett; but that objections were raised thereto by the said Costello, and Hallenborg being unable to or not desirous of entering into this contract alone and without the said Costello, for that reason the same was not signed.

Various other contracts were suggested and drawn of like tenor and import, all of which were consented to by the said Cobre Grande Copper Company and the said Hallenborg, but were not satisfactory to the said Costello, and they in turn were rejected and not signed for that reason.

45 That these negotiations were kept up between the plaintiff and Costello on the one part and E. B. Gage, trustee as aforesaid, on the other part, till about the first week in December, 1900, and nothing resulted therefrom.

That the stockholders represented by the said Gage became restless and urged him to make the sale of said stock, and many of them were threatening to withdraw their stock from the pool and withdraw their power of attorney to Gage and sell their stock to Greene, unless Gage should negotiate with Greene at once.

That thereupon, realizing that nothing further could be done through the said Hallenborg and Costello, the said Gage opened negotiations with William C. Greene to sell him the stock. That said Greene offered to purchase said stock upon better terms than anybody else had ever offered. That said Gage consulted the directors and a large majority of the holders of stock of the Cobre Grande Copper Company and they urged him to enter into a contract with Greene for the sale of the stock. That the stock represented by Gage participating in said contract, comprised the entire stock of the Cobre Grande Copper Company, except that owned by Greene and his associates, and about 6,500 shares owned by other parties.

That thereupon said Gage took this matter up with said Greene, and after a thorough and careful consideration and full negotiations, did, on the 12th day of December, 1900, enter into the contract marked Exhibit "B" in plaintiff's application for injunction and receivership filed in this case, and which is asked to be taken and read as part of the answer herein as fully as if written out at length in this answer.

That after said contract was made, the board of directors and also the stockholders of the Cobre Grande Copper Company, met and ratified said contract in its entirety and accepted the terms and provisions thereof.

That immediately upon executing the said contract the said Greene paid fifty cents a share for each of the shares repre-
46 sented in said pool, including fifty cents for each share then owned and held by the plaintiff.

That all of the stockholders accepted the money so paid to the said Gage, and ratified said contract, except the said plaintiff Hallenborg, who returned the money sent to him and declined to be bound by said contract; and exclusively, as defendants are informed and believe, on the ground of his failure to become a purchaser of the stock himself.

That this contract was entered into in good faith and for the best interests of the Cobre Grande Copper Company and its stockholders, and was so believed by the said Gage.

That when the payment of thirty-seven thousand five hundred ($37,500) dollars fell due on November 26, 1899, under the option contract between Greene and Mitchell, and which was thereafter assigned to the Cobre Grande Copper Company, as hereinbefore mentioned, the said Cobre Grande Copper Company being without funds was unable to make said payment, and never did make the same nor offer to make the same nor any part of the payments thereafter falling due under said contract.

That defendant Greene entered into the possession of the mining property mentioned in the complaint on or about the month of October, 1899, and thereupon the Cobre Grande Copper Company instituted suit No. 3437 in the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, hereinbefore referred to.

That said suit was afterwards on the 15th day of April, 1901, decided adversely to plaintiff and in favor of the defendants, as hereinbefore set forth.

That the suits mentioned in the complaint as pending in the State of New York, are, as these defendants are informed and believe, still pending.

That the other suits mentioned in the complaint were all dismissed prior to the institution of this action or otherwise disposed of by final judgment, as these defendants are informed and be-
47 lieve; except the suit pending in the Republic of Mexico, as to what disposition has been made with that suit these defendants are not informed.

Wherefore, these defendants pray that having fully answered, plaintiff take nothing by his action and that they be hence dismissed with their costs.

BEN GOODRICH.
HERNDON & NORRIS.
L. H. CHALMERS.

TERRITORY OF ARIZONA, }
County of Yavapai, } ss:

L. H. Chalmers, being duly sworn, on his oath deposes and says: That he is one of the attorneys for the defendants in the above-entitled action, and as such he makes this answer for and in their behalf. That he has heard the foregoing answer read and knows the contents thereof. That the same is true of his own knowledge; except as to those matters therein stated on information and belief, and as to those matters he believes them to be true.

L. H. CHALMERS.

Subscribed and sworn to before me this 12th day of May, 1902.

F. B. PHILPOTT,
Notary Public.

Filed May 12th, 1902.

J. M. WATTS, Clerk.

48 Petition of J. Edward Addicks to Intervene.

(Title and Venue.)

Notice of Presentation.

To the above-named defendants, Cobre Grande Copper Company, E. B. Gage, J. Henry Wood, W. M. Adamson, Con O'Keefe, and the Phœnix National Bank, of Phœnix, Arizona Territory, or Herndon & Norris and L. H. Chalmers, their attorneys of record; and to defendant George Mitchell, or Robert E. Morrison, his attorney of record; and to defendants William C. Greene, Cananea Consolidated Copper Company, and Greene Consolidated Copper Company, or Barnes & Martin, their attorneys of record, and J. H. Costello:

GENTLEMEN: You, and each of you will please take notice that I, the undersigned, J. Edward Addicks, will, on Saturday, the 28th day of December, A. D. 1901, at the court house in Prescott, Arizona, at the hour of 9.30 o'clock a. m., or as soon thereafter as counsel can be heard, present to the above-entitled court, his petition for leave to intervene, and become party plaintiff in the above-entitled action, a copy of which said petition is hereto annexed.

Respectfully,

J. EDWARD ADDICKS, Petitioner,
(Signed) By HAWKINS & WILSON,
His Attorneys.

49 (Title and Venue.)

Petition of J. Edward Addicks for Leave to Intervene and Become Party Plaintiff in the Above-entitled Cause.

To the honorable, the district court of the fourth judicial district of the Territory of Arizona, within and for the county of Yavapai:

Your petitioner, J. Edward Addicks, comes and represents to the court that:

1. On the 5th day of January, 1901, Axel W. Hallenborg, as party plaintiff, brought his action in this court against the Cobre Grande Copper Company, a corporation organized under the laws of the Territory of Arizona, E. B. Gage, W. M. Adamson, John H. Costello, Henry Wood and Con O'Keefe as its directors.

William C. Greene, George Mitchell, Phœnix National Bank of Phœnix, Arizona, The Cananea Consolidated Copper Company and Greene Consolidated Copper Company as parties defendant, the said action being cause No. 3268 on the calendar of this court; and that the said defendants have all answered except defendant John

H. Costello, and that said cause is now at issue and for trial at the adjourned term of this court, February, 1902.

2. That said plaintiff alleges that he is a stockholder, and also a creditor of said defendant the Cobre Grande Copper Company, and that he is the owner of upwards of 8,000 shares of the stock of said company, and has been since July 15, 1900.

3. Plaintiff also alleges divers and sundry grievances against the said defendants, charging grave violation of his rights as a minority stockholder, and of all other stockholders, similarly situated.

4. Said plaintiff avers that he brings this suit on his own behalf and on behalf of all other stockholders, and creditors of said defendant Cobre Grande Copper Company, similarly situated, who may desire to come in and contribute as parties plaintiff to the expense of this action.

5. Said plaintiff concludes with a prayer, among other things, for injunction against defendants, and that a receiver be appointed to take possession of the assets, and property of said Cobre Grande Copper Company, to protect the same, and to do all other things to protect the property, etc., and rights of plaintiff against the acts, etc., of said defendants.

6. Your petitioner here avers and gives the court to know that he, the said J. Edward Addicks, is a resident of the State of Delaware, and is similarly situated as plaintiff, Axel W. Hallenborg, as a minority stockholder in said Cobre Grande Copper Company. That is to say: and your petitioner, J. Edward Addicks, alleges that he is the owner and holder of 5,000 shares of the stock of the Cobre Grande Copper Company, and was at the bringing of the plaintiff's action, all of which was treated similarly as was plaintiff's.

7. That your petitioner desires to come into this cause as a party plaintiff in this action with said plaintiff Hallenborg, and to his said complaint, and to contribute as party plaintiff to the expense of said action, and he hereby adopts the complaint of the plaintiff herein.

Wherefore, your petitioner, J. Edward Addicks, prays that he be permitted to intervene and come into this cause as party plaintiff, with the said Hallenborg, and contribute to the expenses of the same; that his rights as a minority stockholder in said Cobre Grande Copper Company may be properly adjudicated in said action, with those of said plaintiff Hallenborg, and for such other relief as the court may deem equitable and in duty bound petitioner will ever be.

(Signed) J. EDWARD ADDICKS,
By HAWKINS & WILSON,
His Attorneys.

51 TERRITORY OF ARIZONA, County of Yavapai, } ss:

J. J. Hawkins, being duly sworn, deposes and says: That he is one of the attorneys for J. Edward Addicks, petitioner in the foregoing petition named, and makes this affidavit for and on behalf of said petitioner, who is absent from the Territory of Arizona; that he has read the foregoing petition, and knows the contents thereof, and that the facts therein stated are true in substance and fact.

(Signed) JOHN J. HAWKINS.

Subscribed and sworn to before me this 14th day of December' 1901.

(Signed) J. F. WILSON,
[SEAL.] Notary Public.

My commission expires Sep. 31, 1905.

(Endorsed:) Filed at 9.30 o'clock a. m., Dec. 28th, 1901.—J. M. Watts, clerk.

52 Demurrer and Replication to Amended Answer of E. B. Gage and Others.

(Title and Venue.)

The plaintiff, Axel W. Hallenborg, for reply to the amended answer of E. B. Gage and others this day filed, and especially to the first paragraph thereof beginning at page 2 and ending at the seventh line on page 4 thereof, says:

First. He excepts to the sufficiency of the said paragraph, and demurs thereto because it does not state facts sufficient to constitute a defense to the plaintiff's original action herein;

Second. Because the same is not responsive to plaintiff's complaint herein;

Third. Because the same sets forth no facts as reasons why a receiver should not be appointed upon the facts stated in plaintiff's original complaint;

Fourth. Because the same does not constitute a valid answer to plaintiff's complaint.

Wherefore he prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further replying, should said demurrer be overruled, plaintiff says:

First. He denies that the court of the third judicial district made the findings alleged in said paragraph; denies that there was any finding by said court, that the Cobre Grande Copper Company had

53 forfeited all rights and titles under and by virtue of the contract between Greene and Mitchell and assigned to the Cobre Grande Copper Company; denies that the court found that the said William C. Greene had not wrongfully taken possession of the said property; denies that the court found that the Cobre Grande Copper Company had failed to perform the conditions of its contract to pay the purchase price of said property.

And further replying to that part of the said paragraph wherein the said defendants, E. B. Gage, *et al*, in this amended answer assert that the said judgment is still in force and has not been appealed from, or writ of error sued out thereon, he says:

It is true that the said judgment has not been appealed from and that no writ of error has been sued out thereon for the reason that because of the conduct of the said Gage and the other defendants answering here with him in executing the contract of December 12, 1900, set forth in plaintiff's original complaint herein, wherein and whereby all of the rights of the Cobre Grande Copper Company had been surrendered to the said Green and the Greene Consolidated Copper Company, its adversary in litigation, and the officers of the said Cobre Grande Copper Company bartered away to the said Greene in said contract, as shown by said contract of December 12, 1900, this plaintiff and others in like estate were rendered powerless to take any appeal from said judgment, or to sue out any writ of error thereon; therefore, the original action in this cause was brought for the purpose of having a receiver appointed who might have the power to open up these proceedings and go in the protection of plaintiff's rights and of the rights of others in like estate.

Wherefore he prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further replying to the said amended answer found on page 4 and ending on line fourteen thereof, wherein defendants
54 say that plaintiff was a stockholder in the Cobre Grande Copper Company, bound by the judgment against the Cobre Grande Copper Company rendered 15 April, 1901, plaintiff demurs thereto because said paragraph does not state facts sufficient to constitute a valid answer to plaintiff's complaint, or a valid defense thereto; secondly, it shows no reason why a receiver should not be appointed in this action upon the facts pleaded in plaintiff's original complaint.

Wherefore he demands judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further replying to defendant's said amended answer, and especially to the third paragraph thereof, wherein the Texas judgment is attempted to be pleaded as a bar to plaintiff's action herein, plaintiff says:

First. He excepts to the sufficiency thereof and demurs thereto, because the same does not state facts sufficient to constitute a valid defense to plaintiff's cause of action set forth in his original complaint.

Second. Because no cause is therein shown why a receiver should not be appointed upon the facts stated in plaintiff's complaint, and for the reasons set forth therein.

Wherefore he prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Should the said demurrer be overruled, plaintiff, then further replying to the said amended answer, says:

He denies that the court in Texas made the findings alleged in said third paragraph of said amended answer; but, on the
55 contrary, avers the fact to be that the action there pending was a possessory action for certain matte- claimed to have been taken from the Cobre Grande Copper Company mines, and claimed by the Cobre Grande Copper Company, and that the same was tried before a jury, and a verdict directed by the court from which an appeal was taken to the supreme court of the State of Texas, which appeal was dismissed by the said Greene and others in the name of the Cobre Grande Copper Company after the said collusive contract of December 12, 1900, by virtue and power of which the said Greene obtained control of all of the Cobre Grande Copper Company, and of its offices, and by power of which he became *dominus litis* on both sides of all the cases pending between the Cobre Grande Copper Company and W. C. Greene and the Greene Consolidated Copper Company at the date of the filing of this action; and by virtue of said dismissal of plaintiff's rights through its trustee, the Cobre Grande Copper Company, were ignored, and the said cause not permitted to be heard on the said appeal.

Wherefore plaintiff prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further replying to the said amended answer, plaintiff admits that the causes of action pending in the third judicial district of the Territory of Arizona, and in the State of Texas, and in Mexico, were pending at the date of the commencement of this action, wherein the Cobre Grande Copper Company was plaintiff, and W. C. Greene and others, defendants.

It is true that the said causes were not then determined by the courts in which they were pending; but in connection therewith, plaintiff alleges the fact to be that while said causes were pending before the said courts in which judgment had not been rendered, in order to obtain control of both sides of the suit, the said W.
56 C. Greene, the Greene Consolidated Copper Company, and others acting with them, as alleged in plaintiff's original com-

plaint herein, entered into the contract of December 12, 1900, set up in said original complaint, wherein the agreement was that on Greene obtaining control of the Cobre Grande Copper Company's stock, the said causes should be dismissed and disposed of, and that the officers of the said Cobre Grande Copper Company should resign, and their places be filled by men of Greene's choosing; and on and before the dismissal of the said causes and judgments rendered therein, then plaintiff brought this suit in this court for the purpose of having a receiver appointed, and the accounting prayed for, as shown here, for the protection of the interests of the minority stockholders; and that when said suit was brought the said W. C. Greene, and others acting with him, as alleged in plaintiff's complaint, at a time when and while the said Greene was *dominus litis* on both sides of the actions pending, and by virtue thereof was controlling the litigation on both sides of said causes, as they were then presented, they appeared in court, or directed the same to be done, and on their motion, the said litigation which had been instituted by the said Cobre Grande Copper Company against the said W. C. Greene, the Greene Consolidated Copper Company *et al.*, was dismissed or judgment taken therein at their instance, in which the rights of the plaintiff and those of others in like estate as minority stockholders had no representative or advocate, or any one to speak for them in the premises, or to call the court's attention to the violation of their rights, as was being done by the said procedure and dismissal of the said causes, as before stated.

Hence plaintiff insists that the same was a fraud upon the rights of the plaintiff, a violation of the rules of equity, and an imposition upon the court; and therefore, these defendants should not be heard to plead the said judgment, thus obtaining as a bar to plain-
57 tiff's right of action herein, because they were parties to the fraud and conspiracy set up in said contract of December 12, 1900, which resulted as aforesaid.

Wherefore plaintiff prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further replying to the said amended answer, plaintiff says that he excepts to all of the same and demurs thereto:

First. Because the facts set forth in said amended answer are not sufficient to constitute a valid defense to plaintiff's cause of action tendered by his complaint.

Second. Because the said amended answer sets forth no reason why a receiver should not be appointed to take charge of the matter related in plaintiff's original complaint, and to proceed to the protection of plaintiff's rights and the rights of others in like estate.

Third. Because the said amended answer upon all of its facts, and the whole of its content, shows that there was a collusion of the officers of the Cobre Grande Copper Company with the said Greene prior to the bringing of this action in this court, and that the same

is now continued by the said amended answer as an approval of the same.

Wherefore plaintiff prays judgment as prayed for in his original complaint.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

(Endorsed :) Filed May 13th, 1902, at 9.30 a. m.—J. M. Watts, clerk.

58 Answer to the Defendant's Cross-complaint and Reply to the New Matter Set Up in His Amended Answer.

(Same Title.)

The plaintiff, Axel W. Hallenborg, comes, and for reply to the amended answer of defendants, says, first, that he excepts to the sufficiency of the fourth count in said amended answer, found at page 3 of said amended answer, because the facts set forth in said count in said amended answer do not state facts sufficient to constitute a cause of action.

Wherefore he prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further answering the fifth paragraph of said amended complaint, found at page 4, plaintiff excepts to the same and demurs thereto because the said paragraph does not state facts sufficient to constitute a valid defense or a valid answer to plaintiff's complaint.

Wherefore he prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

And further answering said paragraph in the event that said demurrer should be overruled, plaintiff says that it is true, as stated in said amended answer, that the said suit, No. 3,437 on the docket of the third judicial district court in Phœnix, was pending at the date of bringing of plaintiff's original action herein, wherein The Cobre Grande Copper Company was plaintiff and W. C. Greene *et al.* defendants.

59 It is true that said cause was not then determined by the court, but in connection herewith, plaintiff alleges the fact to be that while said cause was pending before the said third judicial district court, and while the same had been tried, in order to obtain control of both sides of the suit, the said W. C. Greene, the Greene Consolidated Copper Company *et al.*, acting with him, as alleged in plaintiff's original complaint, entered into the contract of December 12, 1900, set up in said original complaint, wherein the agreement was that on Greene obtaining control of the Cobre Grande

Copper Company stock, the cause should be dismissed; and that notwithstanding said agreement to dismiss said cause, and before the same was done, this plaintiff brought this suit in this court for the purpose of having a receiver appointed, the accounting prayed for, as shown here, for the protection of the interests of the minority stockholders; and that when said suit was brought, the said W. C. Greene, and others acting with him, as alleged in plaintiff's original complaint, instead of dismissing said cause as they had agreed to do, went before the court at Phœnix and there, while he was *dominus litus* on both sides of the case controlling the litigation on both sides, as it was then presented with the counsel for the Cobre Grande Copper Company and E. B. Gage acting with him, appeared in court, and upon their own united motion judgment was rendered as pleaded by defendant herein in paragraph 5, in which the rights of the plaintiff and others in like estate were absolutely ignored and disregarded, and whose rights were violated by the judgment rendered and the said Greene being *dominus litus* on both sides of the case, and at which time and place this plaintiff, and others in like estate as minority stockholders, had no representative, or no advocate, or no one to speak for them in the premises, or to call the court's attention to the violation of their rights, as it was being done by the said procedure.

Hence plaintiff insists that the same was a fraud upon the rights of the plaintiff, a violation of the rules of equity, and an imposition upon the court; and, therefore, he should not be heard to plead the said judgment thus obtained as a bar to plaintiff's right of action herein.

60 Wherefore he prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further answering defendant's amended answer, and especially the sixth paragraph thereof, plaintiff demurs thereto because the same does not state facts sufficient to constitute a valid defense, or a valid answer to plaintiff's complaint.

Second. Because the said matter set up in said paragraph 6 offers no excuse for entering into the contract of December 12, 1900, referred to and set forth in plaintiff's original complaint.

Third. Because the same fails to show any cause why the plaintiff, and others in like estate, were ignored in said settlement, or in the said judgment pleaded.

Fourth. Because the said plaintiff, and others in like estate, were not heard in their own right in the said court in the third or fourth judicial district of Texas, nor were they made parties thereto or consulted in the transactions of said trial.

Wherefore plaintiff prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further answering defendant's amended answer, and especially paragraph 7 thereof, found on page 8, plaintiff demurs thereto because the facts stated therein are not sufficient to constitute a valid defense or a valid answer to plaintiff's complaint, set forth in paragraph 4 of said complaint.

61 Wherefore plaintiff prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Secondly. Should said demurrer be overruled, plaintiff denies that he was a party to said contract of December 12, 1900; denies that he ever aided in its execution or that he ever approved the same; denies that he ever received any consideration from the same, or because of the same; denies that he ever authorized any person whatsoever to ratify or approve the same for him; or that he ever did any act to make himself a party thereto; nor did any other minority stockholder now interested in this litigation; but, on the contrary, plaintiff avers that he was in the city of New York while the same was going on and being executed; and that just as soon as he learned of the execution of the said contract; and that the defendants then in litigation opposing the Cobre Grande Copper Company, in which plaintiff's interest was, had obtained a controlling interest in said Cobre Grande Copper Company; that is, when he learned that the said Greene had obtained one hundred and fifteen thousand (115,000) shares of stock of the said company, and thereby obtained control of it, and also of the litigation, he then declined to become a party to the said contract, or to endorse the action of E. B. Gage, who was trustee therein executing the same, and then and there elected to try and protect his rights and save them from the threatened destruction of said contract by making a minority stockholders' action, as he has in this case; and has appealed to the court for the purpose of seeing that the minority rights of the Cobre Grande Copper Company shall be protected and preserved.

He denies that he ever received any consideration whatever growing out of the said contract. He refused to take the small pittance offered by the defendants in the then litigation and by the said Greene, who sought to obtain control of the same, that he
62 might protect his rights in an independent action, which he brought. He denies, therefore, that any repudiation of the said contract, which he made on information of the same being executed by the said Gage as trustee and as president of the Cobre Grande Copper Company, and the said Greene as trustee and as president of the Greene Consolidated Copper Company, was a breach of said contract to the injury of the said Greene or others entering into it; but that the same was done for no other reason than to protect his own interests and rights in the Cobre Grande Copper Company; and that the said contract itself authorized all who did not endorse the said contract, to withdraw all interests from the same.

Wherefore he prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further replying to the said amended answer, and especially to paragraph 8 thereof, plaintiff excepts to the sufficiency thereof, and demurs thereto, because the facts stated in this paragraph do not constitute a valid answer to plaintiff's complaint; nor do they constitute a valid defense to the cause tendered in said complaint.

Wherefore plaintiff prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further answering to the said count in said amended answer, he denies that he ever published far and wide, or at all, in the newspapers throughout the country, or caused the same to be done, the facts set up in his petition, as alleged in plaintiff's complaint for intervention. He says it is not true, as stated, that the said actions heretofore brought were not brought in good faith for the purpose of enforcing rights. He says it is not true that his action here and other actions brought were for
63 the purpose of "bearing" the stocks of the Greene Consolidated Copper Company, and the values thereof in order that he might purchase the same for a less price. He denies that the said actions heretofore brought, and this action as well, were brought for the purpose of publishing to the public throughout the country, to the knowledge of proposed purchasers of the stock of the Greene Consolidated Copper Company for the purpose of injuring said company and the defendant Greene; but that this action, and all other actions heretofore brought, were for the purpose of protecting his rights and those of others in like estate, and to prevent them from being destroyed by the fraudulent conspiracies and combinations alleged and set up in plaintiff's original complaint, and for no other purposes; and he denies that these actions have unlawfully damaged the said Greene or the said Greene Consolidated Copper Company, or any other person acting in concert with them, or with the said W. C. Greene.

Wherefore he prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Plaintiff, further answering to the said amended answer, and especially to the ninth count or paragraph therein, says:

First. He excepts to the sufficiency of said count or paragraph, and demurs thereto, because the same does not state facts sufficient to constitute a valid cause of action, or to constitute a valid judgment of estoppel.

Second. Because the facts set forth in said ninth paragraph of said amended answer show no lawful reason why a receiver should not be appointed and an accounting had, as prayed for in plain-
64 tiff's original complaint, upon the reasons set forth in said original complaint.

Wherefore he prays judgment.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

Further answering to the said amended answer generally, plaintiff avers that each and every action which was pending at the time this action was brought on the — day of ——, was taken charge of and controlled by the said Greene, the Greene Consolidated Copper Company and his coadjutors whom he controlled, all of which was because of the power given him by the said contract of December 12, 1900, which placed in his hands a majority of the stock of the original Cobre Grande Copper Company; that the said suits which were pending at the date of the said contract and at the date of this action, were controlled in the interests of the said Greene and the said Greene Consolidated Copper Company by him and said company, because by virtue of the said contract of December 12, 1900, he, the said Greene, became and made himself *dominus litus* on both sides of all the cases then pending; and that their termination in his interest was because of that control, in which this plaintiff, and others in like estate, were not heard or represented, but ignored, and their rights sought to be destroyed; and unless a receiver can be had whereby these fraudulent schemes heretofore related, and related in plaintiff's original complaint, and transactions and procedures may be opened up and the rights of these minority stockholders thereby protected, then this plaintiff's rights and those of all others in like estate, will have been destroyed and swept away without any fault on their part, without their consent, without their authority and without any negligence on their part, because they have always, since the action of the said Greene and the said Gage in the
65 contract of December 12, 1900, been seeking for redress and for protection of their rights so violated by said contract.

The premises being seen, plaintiff prays judgment, as prayed for in his original complaint herein.

(Signed) HAWKINS & WILSON,
Attorneys for Plaintiff.

(Endorsed:) Filed May 12th, 1902, at 10 a. m. J. M. Watts, clerk.

Minutes of the Court.

(Title and Venue.)

April 25th, 1901.

Plaintiff's motion for the appointment of a receiver and the issuing of an injunction, order to show cause and answer of the defendants coming on to be heard, J. J. Hawkins, Esq., appearing for plaintiff, and L. H. Chalmers and Herndon & Norris for defendants; on motion of J. J. Hawkins, Esq., it is ordered that the name of J. F. Wilson be entered as of counsel for plaintiff. The motion was fully argued by respective counsel, and with the affidavits filed herein submitted to the court for consideration and decision.

June 3rd, 1901.

Case set for trial July 16th, 1901.

July 8th, 1901.

Comes now defendants by their attorneys, Herndon & Norris, L. H. Chalmers and W. H. Barnes, and present their motion, supported by affidavits, for continuance of this cause. Come also plaintiff by his counsel, Messrs. Hawkins & Wilson, and resists the motion.

By agreement case reset for trial September 16, 1901.

September 16th, 1901.

66 By consent of counsel and on motion of Herndon & Norris, counsel for defendants, this cause is ordered continued for this term.

November 5th, 1901.

By consent case set for trial Dec. 16th, 1901.

December 2d, 1901.

By agreement of counsel this cause is continued for hearing until February 10th, 1902.

December 28th, 1901.

The petition of J. Edward Addicks to be made a party plaintiff herein, was presented by agreement of counsel, hearing thereon was continued.

January 25th, 1902.

The application of J. Edward Addicks to be allowed to intervene and become a party plaintiff herein, coming on to be heard, and Hawkins & Wilson appearing for petitioner and R. E. Morrison appearing and demurring for defendant, and it appearing that notice of the application had been given and the court having heard the argument and fully considered the same, overruled the demurrer (to which defendant excepted) and ordered that the petition of J. Edward Addicks be granted, and it is therefore ordered that the said J. Edward Addicks be and he is hereby made on said application and in accordance with the offer contained therein, a party plaintiff in said action.

February 24th, 1902.

This cause being called for trial, comes now the plaintiff by Messrs. Hawkins & Wilson, and moves the court for a continuance herein, and that the cause be set for trial May 12th, 1902, and defendants consenting it is so ordered by the court.

May 12th, 1902.

On motion of Hawkins & Wilson it is ordered that the name of Albert Cruikshank be entered of record as of counsel for
67 plaintiffs herein. On the motion of Herndon & Norris it is ordered that the names of Ben Goodrich, E. S. Ives and Norton Chase be entered of record as of counsel for defendants herein.

Now this cause being called for trial and the respective parties being present in court by their counsel, Messrs. Hawkins & Wilson and Albert Cruikshank for the plaintiffs; and Messrs. Herndon & Norris, Barnes & Martin, L. H. Chalmers, Robert E. Morrison, Ben Goodrich, E. S. Ives, Norton Chase and J. M. Jamison for defendants, and respective counsel answering ready, the court sitting without a jury, a jury in the case being specially waived by the respective parties, proceeded to hear the cause; and further hearing was, on motion of plaintiffs, continued till 9.30 o'clock a. m. to-morrow, May 13th, A. D., 1902.

May 13th, 1902.

The trial of this cause having been continued until this day, and the respective parties hereto being present in court by their counsel, proceedings on trial of cause were resumed. The complaint herein having been heretofore read to the court, the reading at this time was waived, and statement of plaintiff's cause was made by counsel for plaintiff; and answers read by defendant's counsel.

Plaintiffs to sustain the issues on their part introduced documentary evidence, to-wit:

Shares of stock of the Cobre Grande Copper Company issued to A. W. Hallenborg offered and admitted.

It is mutually agreed by all the parties to this cause that in the introduction of evidence, copies of all documents offered and proven may be used and admitted without objection, except as to admissability of original.

And witness J. Henry Wood was sworn and testified on behalf of plaintiff; and documentary evidence, to-wit, depositions of A. W. Hallenborg and A. T. Herd and of Grant R. Bennett were offered and admitted on the part of the plaintiff.

68 And further hearing was continued until 9.30 o'clock a. m., to-morrow, Wednesday, May 14th, 1902.

May 14th, 1902.

This cause coming on regularly for further hearing upon the trial, and respective parties appearing in court and answering ready, proceedings on the trial were resumed.

Witness J. Henry Wood was recalled and examined on behalf of the plaintiff.

Comes now the plaintiff and moves the court for leave to strike out and amend paragraph 3 of his complaint herein, which motion

is resisted by defendants, and after hearing the argument the court sustains the motion, and plaintiff amends paragraph 3 of the complaint by striking out after the word "agents" the words, "arising out of the following facts," and inserting in place thereof, the words—"which litigations are as follows and were based upon the following claims, charges and allegations, made by the Cobre Grande Copper Company in that behalf. And plaintiff rests.

And defendants to sustain the issue on their behalf introduced documentary evidence, to wit:—Judgment roll in case No. 3437, third district court for Maricopa county, Cobre Grande Copper Company *v.* William C. Greene *et al.* Also judgment roll in case No. 3211 El Paso county district court, El Paso, Texas, Cobre Grande Copper Company *v.* Consolidated Kansas City Smelting & Refining Company, the aforesaid judgment rolls being duly certified; also defendants introduced power of attorney or agreement by Hallenborg *et al.* to E. B. Gage to sell certain shares of stock of Cobre Grande Copper Company. And witnesses E. B. Gage, L. H. Chalmers, Norton Chase, Wm. C. Greene, Wm. H. Barnes and J. V. Herndon were called, sworn and testified on the part of the defendants, and defendants rested.

And witness William C. Greene was recalled and examined for plaintiff in rebuttal, and witness J. H. Jamison was sworn and testified for plaintiff in rebuttal and closed the evidence.

69 Further hearing herein was continued till 9.30 o'clock a. m., May 15th, A. D. 1902.

May 15th, 1902.

The hearing of this cause having been continued to this day, the respective parties by their counsel being present in court, further proceedings were resumed. The evidence being closed, the cause was fully argued by J. F. Wilson, J. J. Hawkins and Albert Cruikshank, for plaintiff, and by W. H. Barnes, Ben Goodrich and E. S. Ives, for defendant, and was submitted to the court for consideration and decision; it is ordered that plaintiffs have ten (10) days from this date in which to file briefs, and defendants ten (10) days thereafter to file briefs in answer, and that plaintiffs be allowed five (5) days to reply.

September 18th, 1902.

This cause having been heretofore tried and submitted to the court for consideration and decision, and the court having fully considered the matter and being sufficiently advised in the premises, comes now and files its decision and findings, and orders that judgment be entered in favor of the defendants in accordance with said findings and decision.

October 28th, 1902.

Comes now on to be heard plaintiff's motion for a new trial herein, which motion is submitted without argument and by the court over-

ruled, to which ruling of the court plaintiffs in open court duly except.

Come now plaintiffs by ther counsel, J. J. Hawkins, Esq., and give notice in open court of appeal to the supreme court of the Territory of Arizona from the judgment rendered and entered herein and from the order overruling motion for a new trial and from the whole thereof.

It is ordered by the court that thirty (30) days from the date hereof be allowed in which to file bill of exceptions and statement of facts.

70 Decision of the Court.

By Sloan, Judge.

(Title.)

The amended complaint in this action sets forth substantially the following allegations of fact:

That the plaintiffs are stockholders in The Cobre Grande Copper Company, one of the defendants herein, and that the plaintiff Hallenborg is a creditor of said company; that since January 1st, 1900, the said Cobre Grande Copper Company has been engaged in a series of litigation with the defendants William C. Greene, George Mitchell, and their associates, confederates and agents; that said litigation, among other things, involved the title and right of possession to certain mining property situate in the State of Sonora, Republic of Mexico.

It is alleged that the Cobre Grande Copper Company claims to be the rightful owner and entitled to the possession of said property, and that the defendant Greene wrongfully and fraudulently had dispossessed said company, and is now in the wrongful and fraudulent control of the same. It is alleged that suits are pending in the courts of Mexico, brought by the Cobre Grande Copper Company to recover possession of said property, and for the recovery of copper matte and other products taken by Greene from the same. It is also alleged that there was pending, at the time of the commencement of this suit, an action in the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, against the defendant Greene, the defendant Mitchell and the defendant Phœnix National Bank, to prevent the delivery by said bank to said Greene of certain deeds to said mining property, held by said bank in escrow, and to have the rights of the Cobre Grande Copper Company in and to a certain contract of sale and purchase of said property determined and adjudged; and that said action was

71 brought in aid of the efforts of the said Cobre Grande Copper Company to recover said property, and to have the right of the Cobre Grande Copper Company, after the restoration of the possession of said mines, to make a payment of $37,500.00 due under said agreement for the purchase declared to be an existing right, and

that said contract of purchase be declared to be in full force and effect.

It is further alleged in the amended complaint, that for the purpose of controlling the suits brought by the Cobre Grande Copper Company as aforesaid, said Greene and the Greene Consolidated Copper Company entered into fraudulent and corrupt contract and conspiracy with the defendant E. B. Gage and other directors of the Cobre Grande Copper Company, wherein it was agreed between the said Greene and the said Greene Consolidated Copper Company on the one side, and the defendant E. B. Gage and the Cobre Grande Copper Company, by said E. B. Gage, president, on the other side, substantially as follows: That the said Greene and the Greene Consolidated Copper Company agreed to buy from the defendant Gage 115,049 shares of stock of the Cobre Grande Copper Company, held by him as trustee for certain stockholders of said company, at the price of $2.50 per share; and that upon the purchase of said stock being made the defendants Adamson, Costello, Wood and Con O'Keefe, as a part of said transaction, would resign as directors of said Cobre Grande Copper Company; and that said Greene and the Greene Consolidated Copper Company should thereupon be allowed to elect and appoint the officers and directors of the Cobre Grande Copper Company in their own interests; and that, further, the suits, actions and proceedings brought by the Cobre Grande Copper Company for the protection of its rights against the said Greene, Mitchell and the Greene Consolidated Copper Company, should be dismissed.

It is also alleged that as a further consideration of said agreement, it was agreed that said Gage should receive for himself five thousand shares of the stock of the Greene Consolidated Cop-
72 per Company, alleged to be at the time of the market value of ten dollars per share. And further, that the defendant Costello, a director of said Cobre Grande Copper Company, should have large personal benefits to himself, to wit: that his note for $23,000.00, to the Cobre Grande Copper Company, should be surrendered to him.

It is further alleged that the other directors, Adamson, Wood and Con O'Keefe, by a secret compact and arrangement, between them and the said Greene and the said Greene Consolidated Copper Company, were to receive additional gains and advantages, either by way of stock in the Greene Consolidated Copper Company, or in some other way; that said agreement and the whole thereof was and is illegal and fraudulent as to the plaintiffs, and as to all other persons, creditors and stockholders, similarly situated; and that the object and effect thereof is to transfer to the enemies of the Cobre Grande Copper Company the management and control of the corporation with the intent and design that such management and control should be used to prevent the said Cobre Grande Copper Company from enforcing its rights as against said Greene and said Greene

Consolidated Copper Company to obtain possession of said property and to complete its contract for the purchase thereof.

It is further alleged in the complaint that the Cobre Grande Copper Company is possessed of no property or assets other than the choses in action represented by said suits; and that if the latter be discontinued or dismissed, said company will be without property or funds with which to pay its debts or to distribute in the way of profits or dividends among its stockholders.

It is further alleged that the said mining property is of great present and prospective value, namely: of the value of $5,000,000 or thereabouts.

It is further alleged that the defendants Greene, Mitchell, the Cobre Grande Copper Company, and the Greene Consolidated Copper Company threaten and intend, for the purpose of destroying and wrecking the Cobre Grande Copper Company, to dismiss or
73 cause to be dismissed and discontinued the said suits and to turn over all the assets of the property of said Cobre Grande Copper Company to said Greene, Mitchell or the Greene Consolidated Copper Company, or some other controlled by them.

The plaintiffs pray for an injunction restraining the defendants from discontinuing or causing to be discontinued or dismissed each and all of said pending suits, and further pray that a mandatory injunction issue directing said defendants to faithfully prosecute and pursue in behalf of the Cobre Grande Copper Company all said actions and proceedings; that a receiver be appointed to take possession of the assets and property of the Cobre Grande Copper Company with power to prosecute and maintain said actions, and to bring such other and further suits as may be necessary to protect the rights of said company.

The complaint prays for other relief in the nature of an adjudication upon facts which are not alleged in the amended complaint, but which are set up in the original complaint on file herein.

A temporary restraining order was granted on the showing made by the original complaint as sworn to, enjoining the defendants from carrying out the terms and provisions of the contract between Greene and the Greene Consolidated Copper Company and Gage, and from discontinuing or dismissing any and all of the actions or suits then pending in behalf of the Cobre Grande Copper Company, and enjoining the defendant Phœnix National Bank from delivering up any of the papers and documents held by it in escrow, evidencing the title held by the Cobre Grande Copper Company in and to the mining property described in the complaint. Subsequently, and after a full hearing, this restraining order was modified, and that part of it enjoining the Phœnix National Bank was dissolved; it appearing that the district court, in and for the county of Maricopa had rendered its decision in the suit of The Cobre Grande Copper Company against Greene and others, referred to in the com-
74 plaint, adversely to the Cobre Grande Copper Company, and that as part of the judgment of the court the Phœnix National

Bank was commanded to deliver up said papers and documents to the defendant Greene.

It was developed upon the trial of the action that the suit brought by the Cobre Grande Copper Company in the State of Texas, which was one of the actions mentioned in the complaint, had been dismissed prior to the issue of the temporary injunction; that another action which was pending in the State of New York is still pending and undetermined, and that the defendants have been enjoined by an order of one of the courts of that State from dismissing said action or causing it to be dismissed. It was also shown that the action pending in the district court of Maricopa county was decided and had gone to judgment. An injunction, therefore, can afford plaintiffs no relief, and as the case now stands, therefore, the suit is one for the appointment of a receiver.

A receiver is asked for upon the grounds that the action pending in this Territory, at the time of the institution of this suit, and which has since been decided by the district court of Maricopa county, was one brought in good faith by the Cobre Grande Copper Company to recover the possession of the Mexican property, and that the cause of action in said suit grew out of the alleged wrongful ouster from the possession of said mining property by the defendants Greene, Mitchell and The Greene Consolidated Copper Company; that the agreement between Gage as president of the Cobre Grande Copper Company, and as trustee for the holders of said 115,049 shares of the stock of said company, and the Greene Consolidated Copper Company, in which it was attempted to bind the Cobre Grande Copper Company from further proceeding with the said litigation and in which it was provided that said suit should be discontinued and dismissed, is fraudulent, first, because it provided for no adequate consideration to be paid the Cobre Grande Copper Company for its agreement to abandon said litigation, and, second, that it
75 provided for large individual gains to be paid Gage and the other directors of the Cobre Grande Copper Company as a consideration for said agreement.

It is further contended as an additional reason for the appointment of a receiver that the judgment of the district court of Maricopa county is not an estoppel of record for the reason that at the time of its rendition the Cobre Grande Copper Company was under the control of said Greene, its officers and directors having been elected and appointed by him and in his interests. The directors and officers of the Cobre Grande Copper Company, at the date of the execution of the Gage agreement, and in accordance with the terms of said agreement, having resigned and their places having been filled as aforesaid in the interests of said Greene and against the interests of the minority stockholders of said company.

The facts show that the suit brought by the Cobre Grande Copper Company in the Maricopa county district court was brought to trial in October, 1900; that the cause was vigorously fought on the part of both plaintiff and defendants in that cause; that after hearing

the testimony and the argument of the counsel, the court took the case under advisement; that, pending the decision, the agreement between Gage and the defendant Greene, above referred to, was entered into.

The parties named in this agreement were William C. Greene and The Greene Consolidated Copper Company, of the first part, and E. B. Gage and The Cobre Grande Copper Company, as parties of the second part.

Substantially the agreement contained the following provisions: Parties of the first part agree to purchase the 115,049 shares of the stock of the Cobre Grande Copper Company, held by Gage as trustee, at the price of two dollars and fifty cents per share, the face value of said stock. The payments were to be made as follows: Fifty cents per share was to be paid on the execution of the contract; one dollar per share was to be paid within thirty days from the date thereof, and another installment of one dollar per share was to be paid within sixty days from the date thereof.

76 In addition to the two dollars and fifty cents per share, said parties of the first part agreed to pay to said Gage a payment of twenty-five thousand dollars ($25,000) in cash, and another payment of thirty thousand dollars ($30,000) in cash, on or before the time for the payment of the first installment thus provided.

It was further agreed that the parties of the first part should transfer three thousand shares of the capital stock of the Greene Consolidated Copper Company, or in lieu thereof, at their option, thirty thousand dollars ($30,000) in cash within thirty days from the execution of the agreement.

It was further provided that Gage might, on or before the time for the second installment to be made on the purchase price, in lieu of two dollars and fifty cents per share, take shares of stock of the Greene Consolidated Copper Company at the rate of four shares of the Cobre Grande Copper Company for one share of the Greene Consolidated Copper Company stock.

It was further provided that at the time of the payment of the last installment on the purchase price of said shares, said parties of the first part were to deliver to Gage five thousand shares of the stock of the Greene Consolidated Copper Company for the individual use and benefit of said Gage, and also five thousand shares of said stock for the use and benefit of L. H. Chalmers, Baker and Bennett, and Herndon & Norris, attorneys of the Cobre Grande Copper Company in its pending litigation. The agreement contained another provision to the effect that the Cobre Grande Copper Company should surrender to the defendant J. H. Costello a certain note given by Costello to the Cobre Grande Copper Company for the sum of twenty-three thousand dollars ($23,000).

The agreement further provided that the Cobre Grande Copper Company should dismiss all suits brought by it against Greene, Mitchell and the Greene Consolidated Copper Company then pend-

ing in New York, Texas and Arizona; that in the suit in Texas, the appeal taken by the Cobre Grande Copper Company to
77 the supreme court of that State should be dismissed, and the same suit in the district court should also be dismissed. It was also provided that in the suits pending in the district court of Maricopa county, which had been submitted for decision, that the order of submission should, by consent, be set aside, and that upon the final payments being made, said suits should be dismissed.

The agreement further provided that any stockholders whose stock was represented by Gage might withdraw their stock from the agreement, provided that said Gage transferred under said agreement at least fifty-one thousand shares.

The agreement further provided that, upon the carrying out of its provisions with reference to the purchase by the parties of the first part of the Cobre Grande stock, the then directors of the Cobre Grande Copper Company should resign as directors and officers of said company.

The date of the execution of this agreement was the twelfth day of December, 1900, and for convenience it will hereafter be referred to as the agreement of December twelfth.

The circumstances which led up to this agreement are as follows: On the twenty-fourth day of October, 1900, certain of the stockholders of the Cobre Grande Copper Company, including the plaintiff Hallenborg, by written agreement, placed in the hands of said Gage as trustee the stock held by them, and which constituted the majority of the stock of said company, and authorized him to dispose of said stock, by sale or otherwise, or any part thereof, upon such terms and conditions as he might deem advantageous to their interests. It also appears that prior to the execution of this agreement and at the time a minority interest in the stock of the company claimed to be in control of its affairs, through a board of directors of which Greene and Mitchell claimed to be members, and that for the most part the holders of the stock not represented in the pooling arrangements represented by the agreement of October
78 twenty-fourth, 1900, were partisans of said defendants Greene and Mitchell.

It also appears that the board of directors representing the majority interests was embarrassed in the prosecution of the company's suits and litigation by reason of lack of funds to meet the expenses thereof, and that various methods were adopted to raise money necessary for said purposes which met with indifferent success; that after the submission of the suits in Maricopa county, many of the stockholders whose shares were held by Gage, as trustee, urged upon the latter the advisability of settling the pending litigation upon such terms as could be had with Greene, Mitchell and the Greene Consolidated Copper Company.

It also appears that Gage was advised by certain of the counsel representing the Cobre Grande Copper Company that the success of the company in the pending litigation was improbable.

It further appears that Gage then conferred with the other directors of the Cobre Grande Company as to the advisability of compromising the said litigation with Greene, Mitchell and the Greene Consolidated Copper Company, and was advised by said directors to enter into negotiations looking to that end; that upon such advice Gage did enter into negotiations with defendant Greene which resulted in the execution of the contract of December twelfth.

It further appears that the contract of December twelfth was ratified by the board of directors of the Cobre Grande Copper Company, and that at the meeting of the stockholders of the stock represented in the pooling contract of October twenty-fourth all the stock ratified the same except that owned by the plaintiff Hallenborg.

It further appears that all of said stockholders further ratified the agreement by the acceptance of the purchase price thereof named in the agreement excepting the plaintiff Hallenborg, who withdrew his stock from the pooling arrangement and declined to accept the purchase price thereof as provided in said contract.

79 It further appears that, after the execution of said agreement, counsel representing both sides to the litigation pending in Maricopa county appeared in court in accordance with the terms of the agreement and procured an order setting aside the submission theretofore made with the right to have the case re-submitted thereafter and the decision had upon record already made.

It further appears that, after the institution of this suit, the same counsel notified the judge of the said court that the case was again submitted and asked for a decision thereof; that thereafter said district court rendered its decision giving judgment for the defendants in said action.

It also appears that at the time of said re-submission of said cause under the terms of said agreement the directors of the Cobre Grande Copper Company, in office at the time of the execution thereof, had resigned and had been succeeded by directors elected by Greene and his associates. It was shown upon the hearing of the cause that all the terms of the agreement of December twelfth were complied with by the parties to said agreement; that of the moneys received by Gage, in addition to the two dollars and fifty cents per share of the stock of the Cobre Grande Copper Company, twenty-five thousand dollars ($25,000.00) thereof was used in the liquidation of the debts of the Cobre Grande Copper Company; and that sixty thousand dollars ($60,000) being the thirty thousand dollars ($30,000) agreed to be paid in cash and the proceeds of the three thousand shares of the Greene Consolidated Copper Company stock, was turned into the treasury of the Cobre Grande Copper Company.

The defendant Gage testified that five thousand shares of the stock of the Greene Consolidated Copper Company, which was agreed to be paid by parties of the first part to him for his own use and benefit, had been received by him; that at the time of the execution of the agreement the Cobre Grande Copper Company was in-

debted to him for money advanced, but in what sum the
80 record does not disclose; that something was due him as salary as president of the Cobre Grande Copper Company, and that those shares were paid to him as compensation for such money advanced, his services as president of the Cobre Grande Copper Company, and as trustee under the pooling contract; that the five thousand shares of stock of the Greene Consolidated Copper Company paid to the attorneys named were paid to them in settlement of their claim for services rendered in the Cobre Grande litigation.

It is urged by counsel for the plaintiffs that the above facts make out such a case as entitles plaintiffs as minority stockholders of the Cobre Grande Copper Company, to an order appointing a receiver to take charge of the assets and affairs of said company, and particularly to bring an action to set aside the judgment rendered in the district court of Maricopa county, and to pursue the litigation in behalf of said company against Greene, Mitchell and the Greene Consolidated Copper Company to recover the property in dispute.

The questions presented are, first, are plaintiffs, as minority stockholders of the Cobre Grande Copper Company, bound by the agreement of December twelfth? Second: If they be not bound by the terms of the agreement, is such a case presented as warrants the court in exercising its discretion and appointing a receiver?

It is elementary law that a stockholder, as such, possesses no right which is not bestowed by the corporation of which he is such stockholder and that whatever binds the corporation, as such, is equally binding upon the stockholder as such.

It will be noted that the agreement of December twelfth is divisible into two several contracts, the one being the sale of the stock held by Gage as trustee to Greene, and the Greene Consolidated Copper Company, and the other being the agreement on the part of the Cobre Grande Company, to dismiss its pending litigation and to turn over the affairs of the company to a board of directors to be elected by Greene and in his interests.

81 A stockholder may sell his stock to whomsoever he may choose, and holders of the majority of the stock of the company may sell their majority interests even to persons whose interests may be adverse to that of the company, and holders of the minority interests have no legal cause for complaint if such sale be made.

With regard to that part of the contract which obligated the Cobre Grande Copper Company to abandon its suits, the plaintiffs, as stockholders, are immediately concerned, and should it appear that such contract be *ultra vires* or tainted with fraud, may be heard to object to its enforcement.

It will scarcely be contended that under the laws of Territory of Arizona, under which the Cobre Grande Copper Company was organized, the board of directors of the company had not the legal right to settle and compromise a suit brought by the company even

to recover possession of its entire property, if such compromise be made in good faith and for an adequate consideration.

It is urged that the agreement of December twelfth is tainted with fraud for two reasons: first, that the officers and directors of the company were induced to enter into the agreement because of substantial individual benefits they were to receive under the terms of the agreement; and, second, that no adequate consideration was paid the Cobre Grande Copper Company for its agreement to abandon its litigation.

The testimony does not establish actual fraud upon the part of Gage and the other directors of the Cobre Grande Copper Company. It is true that under the agreement Gage received the equivalent of fifty thousand dollars ($50,000) for his services. It was not shown that any other director received any consideration as such. It appears that this provision of the contract was inserted after the other terms of the contract had been agreed upon, and that the other directors acquiesced in it and no concealment was made about it or any other provision of the contract. Whether Gage, as against the Cobre Grande Copper Company, has a right to retain this money is a question with which we are not now concerned, nor is it
82 necessary to decide whether or not payment of this sum to Gage makes out a case of constructive fraud.

The objection of want of consideration paid to the Cobre Grande Copper Company depends for its validity upon consideration of the facts surrounding and entering into the agreement.

Upon the face of the contract it does not appear that any consideration was paid. Under the testimony it does appear that the sum of eighty thousand dollars ($80,000) was received and either paid into the treasury of the company or used in liquidation of the payment of its debts. Whether, under the circumstances, this was an adequate consideration for the agreement on the part of the company to dismiss its suits is not decided for the reason that such determination is unnecessary in view of the present status of the case, and the ruling of the court as hereinafter contained.

As has been said heretofore the relief asked for is the appointment of a receiver for the purpose, first: Of taking charge of the property and assets of the Cobre Grande Copper Company, and second: Of prosecuting its litigation.

The testimony shows that the only property in the possession of the Cobre Grande Copper Company is the sum held by the treasurer of the company paid to him by Gage as a part of the proceeds paid by Greene and the Greene Consolidated Company under the agreement of December twelfth. To appoint a receiver for the purpose of taking charge of this fund and applying it to the uses of the company would be inconsistent with the theory of the plaintiffs, inasmuch as it would in effect be the recognition of the validity of the agreement and the ratification of its provisions. It is plain therefore that there is nothing which calls for a receiver in this case except it be for the one purpose of instituting some proceed-

ing which will reinstate the company as a litigant in the situation it was at the time of the execution of the agreement in question, with the ultimate object and purpose of regaining the Mexican property.

If the judgment of the district court of Maricopa county be valid, the appointment of a receiver could be of no avail to
83 the plaintiffs nor afford them any relief, for the effect of that judgment upon its face is an absolute determination, adverse to the Cobre Grande Copper Company, of its rights to the Mexican property.

It is strongly urged by counsel for the defendants that the appointment of a receiver for the sole purpose of bringing or prosecuting a lawsuit is entirely without precedent, and that before embarking, through its receiver, in the business of litigation it should appear to the court by proof that such litigation is meritorious and not speculative merely. It is also urged by counsel for the defendants that this court is without jurisdiction to entertain an action, which has for its sole purpose, the appointment of a receiver. It is pointed out that our statutes contain no expression which can be construed as conferring upon the court jurisdiction to entertain such an action, and that the power does not exist independent of the statute as an inherent power of a court of equity.

Whatever force there may be in the first point urged by counsel for defendants, in the view of the court there is sufficient doubt of the power of the court to appoint a receiver where no other relief is asked for, or can be granted under the pleadings or facts, to cause it to hesitate before exercising its discretion and appointing such a receiver, and to be satisfied that no other remedy is available to plaintiffs for the preservation of their rights as minority stockholders.

The law is well settled that a minority stockholder may maintain any suit which the corporation of which he is such stockholder might maintain for the purpose of preserving or enforcing the rights of such company against other persons, where it appears that the board of directors, as is the contention in this case, are interested adversely to the rights of the corporation, or are acting in fraud of its rights, and refuse, because of such interests or for fraudulent purposes and reasons to prosecute or defend such suits in the interest of such corporation, or refuse or decline otherwise to protect its rights.

If the judgment of the district court of Maricopa county be irregular and voidable, there is no doubt but that the plain-
84 tiffs, as minority stockholders of the Cobre Grande Copper Company, could maintain an action to have such judgment vacated and set aside, and that thereafter could maintain an action as fully and with the same force and effect as could the Cobre Grande Copper Company in its corporate capacity or as a receiver appointed by this court for such purpose.

There is an additional reason why the court should not appoint a receiver which, while not in itself of sufficient importance to deter-

mine the question, is of sufficient moment to be considered in connection with the foregoing. It does not appear that there is any fund available for the payment of the expense of such receivership other than the proceeds of the agreement of December twelfth which, as was said hereinbefore, could not be used without recognizing the validity of the contract and ratifying its provisions.

In view of the court no case is presented under the amended complaint and under the facts put in evidence which entitles the plaintiffs to any relief which the court may grant, and judgment must, therefore, go for the defendants.

RICHARD E. SLOAN, Judge.

85 (Same Title.)

To the above-named defendants or Herndon & Norris, L. H. Chalmers, Ben Goodrich, William H. Barnes, E. S. Ives, Norton Chase, J. M. Jamison, and Robert E. Morrison, their attorneys of record.

GENTLEMEN: We hereby tender the statement of facts and bill of exceptions on appeal in the above-entitled cause and ask that you sign and approve the same with all convenient speed, or make your objections as provided by the statute.

Tendered and delivered to attorneys for defendant by us during the term at which the case was tried on this twenty-eighth day of October, A. D. 1902.

HAWKINS & WILSON,
Attorneys for Plaintiffs-Appellants.

Tender admitted and papers received this 28th day of October, 1902.

HERNDON & NORRIS, Attorneys.

86 (Same Title.)

Appellants' Statement of Facts and Bill of Exceptions on Appeal.

This case came on for trial at Prescott, Arizona, and was tried on May 12, 13, 14 and 15, 1902, before the court sitting without a jury, Hon. Richard E. Sloan, judge, presiding.

Appearances.

Hawkins & Wilson and Atwater & Cruikshank, for plaintiffs.

William H. Barnes, E. S. Ives, Norton Chase, for defendants W. C. Greene, Greene Consolidated Copper Company and Cananea Consolidated Copper Company.

R. E. Morrison, for defendant George Mitchell.

Ben Goodrich, for defendant E. B. Gage.

Herndon & Norris, L. H. Chalmers, for defendants E. B. Gage, Cobre Grande Copper Company, W. M. Adamson and the Phœnix National Bank.

J. M. Jamison, Esq., for J. H. Costello.

Mr. Hawkins, on behalf of J. Edward Addicks, read the order of January 25, 1902, making him a party plaintiff and moved to be allowed to adopt on his behalf the complaint on file, which motion was granted.

The pleadings were read and statements of counsel made.

The incorporation of the Cobre Grande Copper Company was admitted and it was stipulated that copies of documents might be offered instead of originals.

Plaintiff offered the stock certificates for 8,617 9/10 shares of the capital stock of the Cobre Grande Copper Company issued to Axel W. Hallenborg.

Admitted and marked Plaintiffs' Exhibit Stock Certificates.

87 J. HENRY WOOD, called for plaintiff-, being duly sworn, testified as follows:

I was familiar with the stock books of the Cobre Grande Copper Company up to the time I resigned the secretaryship in April, 1901. At that time J. Edward Addicks was a stockholder to the amount of 5,000 shares. Mr. Hallenborg's stock was regularly issued to him. In July, 1899, at the time I became connected with the Cobre Grande Copper Company, the stockholders were William C. Greene, George Mitchell, George A. Treadwell, J. D. Dort and O. W. Saxhang. In September, 1899, the directors were Greene, Mitchell. Treadwell, J. H. Costello and J. Henry Wood. Costello was president and I was secretary and treasurer. On November 14, 1899, Mr. E. B. Gage was elected president and the directors were Gage, Wood, Wm. M. Adamson and Con O'Keefe. Mr. Costello became director November, 1900. The capital stock of the Cobre Grande Copper Company consisted of 200,000 shares at $2.50 each, making $500,000. In September, 1899, the Cobre Grande Copper Company was in possession of some nineteen or twenty mining claims in the Cananea mountains; a smelter, store building, general camp equipment for running the mines and everything appertaining to the running of a camp of that kind. The mines were being operated by the Cobre Grande Copper Company and were upwards of $1,000,000 in value. On or about October 11, 1899, the Cobre Grande Copper Company lost possession of the property and William C. Greene obtained possession. The Cobre Grande Copper Company never has been possessed of that property subsequently. In consequence of that change a controversy arose between the company and Mr. Greene and suits were instituted by the Cobre Grande Copper Company in the fall of 1899. One of those suits was commenced in the third district court at Phœnix by the Cobre Grande Copper Company against W. C. Greene and others. On April 3, 1901, there was a meeting of the board of directors and five

88 directors resigned, namely, Mr. Gage, Mr. Costello, Mr. Adamson, Mr. O'Keefe and myself. In place of those resigning there was elected W. C. Greene, William H. Barnes, Jerry Millay, L. H. Chalmers and I think Frank Cox. Judge Barnes is a

lawyer and had been counsel for Mr. Greene for some time, and had represented him in the litigation with the Cobre Grande Copper Company. Mr. Chalmers is an attorney in Phœnix, and up to that time had been representing the Cobre Grande Copper Company. Mr. Millay and Frank Cox were each lawyers and had both been counsel for Mr. Greene. On April 3, 1901, Mr. Greene was made president, Mr. W. H. Barnes treasurer, and Alfred Franklin secretary. The change in the management was made to carry out the terms of the contract of December 12, 1900.

Plaintiffs' counsel offer in evidence copy minutes of the meeting of the Cobre Grande Copper Company, held November 14, 1899, pursuant to call of October 31, 1899; also minutes of the board of directors of November 15, 1899, relative to the election of officers. The object of the offer of the company minutes was to show the passage of resolutions of stockholders directing the prosecution of the claims of the Cobre Grande Copper Company against Greene and others, and for no other purpose.

The minutes offered were received in evidence and marked Plaintiffs' Exhibit 1.

In addition to the property in the Cananeas transferred to Greene as I have stated, the Cobre Grande Copper Company had office furniture in Phœnix and they had some matte. They had some matte en route to the smelter, or at the smelter at that time. I do not know wha- did become of it ultimately. It was placed under some attachment, some law proceeding. I think the value of it must have been $10,000 or $12,000. I referred to the matte which went to El Paso, Texas, which was the subject of the litigation there. The office furniture was turned over to Judge Barnes after the election of new officers in April, 1901. It was worth $150
89 or $200. With that exception the Cobre Grande Copper Company had no assets outside of the property that Mr. Greene got possession of. The Cobre Grande Copper Company is not solvent at present. At the time I severed my connection with it, we were paying debts all along up to the time Mr. Greene took possession. There were no debts presented to be paid right after that. It was not in possession of assets to meet this claim of Mr. Hallenborg. It had no money. I do not know how much money they had after October 14, 1899. At the time I left and ceased to have connection with the company, there were practically no funds on hand.

Cross-examined by Judge BARNES:

The stockholders of the Cobre Grande Copper Company ratified the contract of December 12th by a very large majority. Some time prior to November 14, 1899, there had been two sets of officers claiming to be directors of the Cobre Grande Copper Company and a suit had been pending to try the question which of the two sets constituted the legal board of directors. After the 14th of November,

1899, my recollection is that the action of the board then elected was not questioned. At that election the stock voted amounted to 113,340 shares, which was substantially held in trust by Mr. Gage. At that time I thought the mining property in question was worth about $50,000,000, because of the ore body in existence there. We had been working it about three months at a profit. I never worked a copper property before. As secretary and former treasurer I did not know of any funds. Mr. Dort turned over to me something like $11,000, I think. My salary was paid clear down to and including October, 1900. I do not know of debts of this company that were presented up to the time I ceased to be secretary, which were not paid.

Redirect examination:

The $11,000 was turned over to me in July, 1899. It was
90 used for the operations of the company, its running expenses. I ceased to be treasurer in November, 1900. At that time there was only a few hundred dollars on hand. I remained secretary up to April 1st. I do not know the amount then on hand. Mr. E. B. Knox succeeded me as treasurer. Mr. Gage resigned in April, 1901. I was re-elected secretary in April and acted as such for a few weeks, possibly five or six weeks.

Plaintiffs' counsel offered in evidence eight promissory notes of the Cobre Grande Copper Company, as follows:

Note $12,000 dated Phœnix, Arizona, January 19, 1900, payable April 15, 1900.

Note $14,175, dated March 6, 1900, payable May 15, 1900.

Note $6,000, dated May 1, 1900, payable August 1, 1900.

Note $4,000, dated May 23, 1900, payable August 24, 1900.

Note $1,905.25, dated June 29, 1900, payable October 1, 1900.

Note $1,000, dated August 18, 1900, payable November 18, 1900.

Note $4,283, dated March 15, 1900, payable June 1, 1900.

Note $7,042, dated May 1, 1900, payable August 1, 1900.

Each note executed by the Cobre Grande Copper Company by E. B. Gage, president, and J. Henry Wood, secretary, all bearing six per cent. interest from date; some of said notes to the order of A. W. Hallenborg and some to Benjamin Orne or James Shirley and indorsed or assigned to A. W. Hallenborg; total amount of notes $50,005.

Admitted in evidence and marked Plaintiffs' Exhibit Notes, as one exhibit.

91 Plaintiffs offer in evidence copy pleadings in action No. 3,437, Cobre Grande Copper Company *v.* William C. Greene and others, in the third district court of Maricopa county, Arizona.

Admitted and marked Plaintiffs' Ex. C.

Plaintiffs' counsel further offered in evidence preliminary injunction in the said action by the Cobre Grande Copper Company *v.*

Greene & others, dated November 29, 1899, signed Webster Street, judge.

Admitted and marked Plaintiffs' Ex. D.

Plaintiffs' counsel offered in evidence written agreement dated December 12th, 1900, between William C. Greene of Bisbee, Arizona, and the Greene Consolidated Copper Company, by William C. Greene, its president, of the first part and E. B. Gage, of Prescott, and the Cobre Grande Copper Company, by E. B. Gage its president, party of the second part.

Admitted and marked Plaintiffs' Ex. 3.

Also supplemental contract, same parties, dated December 14th, 1900.

Admitted and marked Plaintiffs' Ex. 4.

Plaintiffs' counsel now read the deposition of Axel W. Hallenborg, filed May 13, 1902, taken July 1, 1901.

AXEL W. HALLENBORG, a witness called on his own behalf, and examined by deposition, testified as follows:

Direct examination:

My age is thirty-four years. I reside at No. 107 East 60th street, New York city. I am a stock broker, and a member of the firm of Armstrong, Shirmer & Company, doing business at 44 Broadway, New York. I am a creditor of the Cobre Grande Copper Company and was so at the beginning of this action. At that time I held notes of the Cobre Grande Copper Company for about $40,000, being
92 of the dates and amounts as follows: January 19, 1900, $12,000; March 6, 1900, $14,175; May 1, 1900, $6,000; May 23, 1900, $4,000; June 29, 1900, $1,905.25 and August 18, 1900, $1,000.

The first two of said notes, were assigned to me for value by Benjamin Orne. I am acquainted with his signature and his signature is at the foot of the assignment indorsed on the back thereof. Since this suit was commenced I have become the owner of two other notes of the Cobre Grande Copper Company, to wit: one note dated March 15, 1900 for $4,283 and another note dated May 1, 1900 for $7,042.

I am acquainted with the signatures of E. B. Gage and James Shirley and their signatures appear on the assignments respectively indorsed on the said notes. These last two notes I procured from James Shirley. I took them in payment of money owing me by him. All these notes are my own property and all of them are now due and unpaid. Nothing has ever been paid on account of any of them. The circumstances under which I first became a creditor of the Cobre Grande Copper Company were that in December, 1899, or January, 1900, or thereabouts, Benjamin Orne, R. T. McCabe and myself loaned to the Cobre Grande Copper Company the sum of $40,000 for the purpose of assisting it in its affairs and

afterwards I advanced further sums of money to said company to assist it in the litigation it was carrying on for the recovery of its mines. The notes which I produce were given on account of these advances. For the $40,000 originally advanced the Cobre Grande Copper Company gave notes for a part and for the rest turned over some notes it held which had been given to it by other persons. These latter notes, however, amount to only a few thousand dollars and I believe have since been paid. The notes given by the Cobre Grande Copper Company on account of the $40,000 loan were all made to Benjamin Orne under an agreement between Orne, and McCabe and myself.

I am a stockholder in the Cobre Grande Copper Company to the amount of upwards 8,000 shares, and have been such stockholder since about July, 1900. The circumstances under which I
93 became a stockholder were that at that time Mr. E. B. Gage held as a trustee a large amount of stock constituting more than a majority of all the stock of the company in trust for a large number of stockholders. I was told that some of the smaller stockholders wished to realize on their holdings and that it would be advisable to buy out their stock and under these circumstances I bought about 8,000 shares of stock and paid for it at the rate of $2.50 per share being the par value thereof.

I have read the complaint in this action and am acquainted with the contents thereof.

My knowledge of the agreement of December 12, 1900, mentioned in the fourth paragraph of the complaint is derived from a copy thereof sent me by defendant E. B. Gage.

As soon as I learned of the agreement I employed the firm of Atwater & Cruikshank, of New York city, as my attorneys to take steps to prevent the carrying out of the agreement and through them also retained as my attorney in Arizona John J. Hawkins, of Prescott, Arizona, to be associated with them, and on their advice I sent to Mr. Hawkins a proxy of my stock with directions to appear at the stockholders' meeting of which I had notice, and which had been called to act on said agreement and directed him to appear and oppose the agreement. I am informed that he did appear there and opposed the same and that he also served written notice upon the officers of the Cobre Grande Copper Company warning them not to carry out the agreement. I also immediately had the papers prepared in this suit and had the suit started in Arizona. I also made application to the district court in the third judicial district for leave to intervene as a party in the suit of the Cobre Grande Copper Company against William C. Greene. The petition for leave to intervene was denied and I then took an appeal from said order, which appeal is still pending and undetermined. I have used every effort in my power to prevent the carrying out of this agreement and have acted as promptly and expeditiously as I was able.

94 Q. State fully any matter or thing relative to the allegations of the complaint herein, as fully and particularly as if you had been specially interrogated in regard thereto, and produce any papers or documents relating to the same.

Objected to by defendant. Objection sustained. Plaintiffs except.

Cross-examination:

The consideration for the indebtedness held by me was for money loaned and advanced to the Cobre Grande Copper Company.

I have already stated that I became a stockholder in the Cobre Grande Copper Company in about July, 1900, and then purchased about 8,000 shares at $2.50 a share. I dealt with E. B. Gage, trustee, and paid the money to him and got the shares from him. Certificates were first issued in the name of William H. Dowe, trustee. Mr. Dowe was trustee for Mr. Costello and myself and afterwards transferred the shares to us according to our interest.

At the time I purchased the stock I knew that there was a controversy between the Cobre Grande Company and William C. Greene and that the controversy was in litigation, and I presume I know that the said William C. Greene claimed the Cobre Grande Company had forfeited its rights to the mining ground mentioned in its contract with George Mitchell. I did not know t-e particulars as to the Elisa mine, which I understood was bought by the Cobre Grande Copper Company from William C. Greene and payment made in notes not yet due. I did understand in a general way that William C. Greene and his associates had seized all the property of the Cobre Grande Copper Company and that the Cobre Grande Copper Company was endeavoring to regain possession of them.

95 I did loan money to the Cobre Grande Copper Company to aid it in its litigation. I was not a volunteer in that litigation because I was applied to by the stockholders of the Cobre Grande Copper Company for assistance. I did not stir up the litigation nor have any thing to do with it until after it was commenced and in progress. I did not stimulate the litigation except by way of advancing money and interesting myself in its progress. I loaned money to the corporation with the expectation of acquiring an interest in the property. I was interested in an option for the purchase of shares of stock in the company. I hoped and expected in case I purchased this stock under the option to make a profit on it in case I desired to sell. My intention in case I purchased the stock was to hold it as an investment and retain my interest therein. There would have been no object to me in loaning to the company unless I was or expected to be interested in the property.

I never visited the mines in controversy and have no knowledge of them based upon personal inspection. I have already stated in

my direct examination my information in regard to them upon what my opinion of their value is based.

At the time I first advanced money to the Cobre Grande Copper Company I became interested in an option for the purchase of shares of stock in that company and I intended to exercise the same when the company regained possession of its mines. The $40,000 first advanced was to be used as far as necessary to pay off any instalment of the purchase price of the mines which the court might determine to be due. It was the understanding when this advance was made that $37,500 of the money should be used to pay an instalment of the purchase price of the mines at such times as the court should decide it was payable. I did not know that there were debts of the Cobre Grande Copper Company which were liens upon the mining ground. At the time I made my first advance to the Cobre Grande Copper Company, the defendant William C. Greene had for some time been in possession of the mines. I heard rumors of in-
96 debtedness being incurred in running the mines but as far as I knew they were indebtedness incurred by said William C. Greene.

I did not embark in said litigation and put up my money as a volunteer for the purpose of stimulating and aiding the litigation, and without any intention of aiding the Cobre Grande Copper Company in paying its debts and meeting its obligation, as stated in the contract of purchase between Mitchell and Greene, and supplemental contract between Cobre Grande Copper Company and W. C. Greene for the purchase of the mining grounds aforesaid.

Q. State if you know of the organization of a corporation called and known as "Sonora Copper Company," and if you answer that you do, please state where the said company was organized and for what purpose for which it was organized.

Objected to by plaintiffs' counsel as incompetent, irrelevant and immaterial.

Objection overruled and plaintiffs except.

A. I know of the organization of the corporation known as the Sonora Copper Company. It was organized under the laws of the State of Delaware in April, 1900. It was organized as a mining and manufacturing corporation.

The Sonora Copper Company was not organized for the purpose of becoming the owner of stock in the Cobre Grande Copper Company, in order that it might pursue its litigation with Greene and his successors and assigns, and to carry on the controversy without putting up any money or aiding the Cobre Grande Copper Company in complying with its contracts of purchase and procuring the purchase price to be paid the said Cobre Grande Copper Company and to pay off the debts of said company which were a lien upon its ground.

Q. Please state fully all the facts with reference to the organization of the Sonora Copper Company—when it was organized, where

it was organized, and for what purpose it was organized; and
97 if you have a copy of the articles of incorporation thereof, please attach a copy of the same to your answer as a part thereof.

Objected to by plaintiffs' counsel as incompetent and irrelevant. Objection overruled and plaintiffs except.

A. The Sonora Copper Company was organized under the laws of the State of Delaware in April, 1900. The certificate was executed in the city of New York.

G. R. Bennett was acting as my attorney in and about December 12, 1900, for the purpose of protecting my interest in an option for the purchrse of stock in the Cobre Grande Copper Company. I understand he was in Phœnix, Arizona, on December 12, 1900. I was in telegraph communication with him between December 1 and December 15, 1900. I have not with me any copies of my telegrams or letters to or from him during that time, and I am advised that I cannot be compelled to produce them. He was acting as attorney and counsel for me and the communications between us were confidential and I am advised are privileged and on that account I should refuse to exhibit them if I had them with me.

I have been informed by Grant R. Bennett that he was present in Phœnix during the trial of the case of the Cobre Grande Copper Company against William C. Greene and others, and that he had knowledge of the proceedings of the trial. At that time he was acting as my personal attorney and watching the trial in my interest. I was not a party to the suit but I was interested in it. I believe that I received telegrams from him during the progress of and after the conclusion of the trial, but these telegrams were personal and confidential communications made by him to me as attorney to client. I presume I have these telegrams now in my possession, but I am advised that they are privileged communications and on that ground I decline to produce them. I have none of them with me at the present time, but I presume that they are either at my house or at my office.

98 I never placed my stock in the Cobre Grande Copper Company in the hands of E. B. Gage with authority to him to dispose of the same on any terms whatever. Mr. Gage never had any authority to sell my stock; he never claimed to have any authority. I never attempted to revoke any pretended authority to Mr. Gage to sell my stock. As far as I know Mr. Gage never undertook or assumed to sell any of my stock.

Q. Please state if you did not have, prior to December 12th, 1900, options authorizing you to purchase the stock of the Cobre Grande Copper Company, or so much of it as was held by E. B. Gage as trustee; and, if so, please state at what price you had options to purchase the same, and state fully the terms of the option. Or, if you state that you did not have any options in your name, state fully if you did not have an opportunity of purchasing all of said stock held

by E. B. Gage in trust, or if you were not interested in an option for the purchase of the same. And please state, without any evasion, fully on this point as to the price of the purchase and the terms, and when the same was to be paid; also state fully if you did not take up said options, why you did not do so; and attach to this deposition any and all options in which you were interested, directly or indirectly, by name or otherwise, as part of your answer hereto?

Objected to by plaintiffs as immaterial and irrelevant.
Objection overruled. Plaintiffs except.

A. Prior to December 12, 1900, I was interested in an option for the purchase of stock of the Cobre Grande Copper Company, or so much of it as was held by E. B. Gage as trustee. The option was at $2.50 a share, and the option extended until ninety days after the Cobre Grande Copper Company got possession of its mines. I did not take up said option because the Cobre Grande Copper Company had not yet regained possession of its property. I have not the written option with me. It was not in my name and I don't
99 think I ever had the original. The option was partly in writing and partly oral.

Q. If you state in answer to interrogatory No. 8 that you made efforts to prevent the carrying out of the contract of December 12th, 1900, state if you were not at that time in the city of New York, and if negotiations were not carried out in the city of Phœnix, Arizona. State whether efforts were made by letter or telegrams to prevent the carrying out of the contract of December 12th, 1900, and, if so, please attach copies of your letters and telegrams, and of all letters and telegrams received by you upon the subject; and if you cannot do so, state why you cannot do so, and what you did with the same, and all about it?

Objected to by plaintiffs' counsel as immaterial and irrelevant.
Objection overruled and plaintiffs except.

A. On December 12, 1900, I was at the city of New York. I understand that the contract of December 12, 1900, was negotiated and executed in the city of Phœnix, Arizona. I have already stated in what way I endeavored to prevent the carrying out of the contract of December 12, 1900. There were letters and telegrams between myself and my attorney, but I do not produce copies of them because they are privileged communications, as I am advised. I have none of such letters or telegrams or copies thereof with me at the present time. I may have written or telegraphed to the defendant Gage on the subject, and, if so, he will be able to produce the letters or telegrams.

In the months of November and December, 1900, I was having negotiations in relations to an option on the stock of the Cobre Grande Copper Company, held by the defendant Gage as trustee. The negotiations were in relation to making changes in an option I already had, as I understand it. I have not with me any letters

or telegrams relating to the negotiatious; most of them are between my attorney, G. R. Bennett, and myself, and were confiden-
100 tial communications. I cannot recollect all the terms offered or proposed. The final result was that nothing definite was agreed upon.

My present occupation is that of stock broker. I have been engaged in the business sixteen years.

The way in which I was drawn into the Cobre Grande Copper Company controversy was this: a representative of the majority stockholders of the Cobre Grande Copper Company came to me and stated that the company needed to raise money to pay its current expenses and to make payment on the purchase price of its mines, and that the person who advanced the money could have an option on the majority of the stock of the company at $2.50 a share, and it was represented to me at the same time that the controversy would be short; that the company would soon be in possession of its mines and that the mines were valuable and the stock of the company would be a good investment. Under these circumstances, with Orne and McCabe, I agreed to advance $40,000, of which $37,500 was to be used to pay an instalment on the purchase price of the mines whenever it was necessary to pay it, and the balance $2,500 was to be used for current expenses of the company. At that time it was represented to me that the litigation was practically over. My idea was that by advancing this money I would get stock in a mining corporation which would be a good investment.

Speculations in legal controversies are not usual in the course of business in the line in which I am engaged, and, as far as I know, they are very unusual. I never was concerned in one before. I never intended to engage in a speculation in a legal controversy. I thought I was getting a good investment in mining property.

101 ANDERSON T. HERD, called as a witness on behalf of the plaintiffs, examined by deposition, testified as follows:

Direct examination:

My age is twenty-nine years. I reside at No. 383 Central park west, New York city. Occupation lawyer.

I have read the complaint and am acquainted with the contents thereof.

In December, 1899, I was practicing law in New York city in connection with the firm of Dowe & Hartridge, and at that time was consulted by A. W. Hallenborg, James Shirley, Benjamin Orne and R. T. McCabe in regard to their interests in the Cobre Grande Copper Company, and as a result thereof I went to Arizona to look into the litigation for them, and after making a full investigation I found that the Cobre Grande Copper Company was involved in the following litigations with William C. Greene and others:

(1.) A suit in the third district court of the Territory of Arizona

against William C. Greene, George Mitchell and the Phœnix National Bank, for an injunction against each of the defendants restraining them, or any of them, from taking the deeds that were in escrow with the Phœnix National Bank and turning them over to the said William C. Greene.

(2.) A *quo warranto* proceeding by the Attorney General on the relation of some of the officers of the Cobre Grande Copper Company to determine who the proper officers of the Cobre Grande Copper Company were, and also asking for an injunction in the same proceeding against Greene and his associates, from acting as officers and from holding themselves out as officers of the Cobre Grande Copper Company.

(3.) I also found that there had been an injunction suit with relation to a certain meeting held at Bisbee, Arizona, which sought
102 to restrain Greene and his associates from holding a special meeting of the directors of the Cobre Grande Copper Company for the purpose of ousting the then officers of the company and electing said Greene and his associates, officers of said Cobre Grande Copper Company.

(4.) I also found that a suit for a receiver of the Cobre Grande Copper Company had been instituted by one Isabella Chace, and was pending at the time I was there.

(5.) I went from Phœnix to Mexico and found that a suit was pending there in the district court at Arispe, State of Sonora, Republic of Mexico, in behalf of the Cobre Grande Copper Company to recover its properties from William C. Greene.

(6.) In addition to this, and growing out of this litigation, a writ of amparo was pending in the Federal court at Negales, State of Sonora, Republic of Mexico.

While I was at Phœnix, I was employed by the Cobre Grande Copper Company to act as one of its attorneys, and I insisted that the first thing to be done would be to go to Mexico and consult Mr. Louis Mendez, or some other attorney of equal standing, and follow his advice in regard to the Mexican litigation, and this was agreed to and Mr. Chalmers and I went to the City of Mexico for this purpose. While on that trip we instituted proceedings to recover matte in El Paso, Texas, through attorneys there. Also by telegraph I instructed Dowe & Hartridge to institute proceedings to recover certain matte that had been shipped here by Greene or some of his companies. The nature of these matte suits is as follows: The Cobre Grande Copper Company claimed the sole right to take ores from the mines of which Greene was in possession. Greene or some of his companies deriving their rights from him had extracted ores from the mines and smelted it into matte and shipped this matte to various
places, and the Cobre Grande Copper Company, where it found
103 this matte, claimed title to it and brought actions in replevin or in the nature of replevin to recover it. Some of such suits were brought at El Paso, Texas, and some were brought in the city of New York. I continued acting as attorney for the Cobre Grande

Copper Company up to December 12, 1900, and at that time the matte suits were still pending; the suit- in the third district court of Arizona by the Cobre Grande Copper Company against Greene, Mitchell and the Phœnix National Bank were still pending and the *quo warranto* proceedings were still pending and the proceedings in Mexico to regain possession of the property were still pending. My recollection is that the action for a receivership brought by Isabella Chace had been dismissed before December 12, 1900. In regard to the writ of amparo in Mexico, which was taken by Greene in the Federal court, I understand that prior to December 12, 1900, the amparo proceedings had been heard by the Federal court and the order or decree given by the district court of Sonora, directing the return of the mines to the Cobre Grande Company, had been set aside on the ground of failure to give proper notice to Greene of the proceedings, and the proceedings had been remanded to the district court with directions to be reheard upon proper notice to Greene.

I know nothing further that I ought to state in regard to the matter considering my position as having been attorney for the Cobre Grande Copper Company.

Cross-examination:

I became attorney for the Cobre Grande Copper Company in the fore part of January, 1900. The Cobre Grande Copper Company has never authorized me as its attorney to make known and divulge, or to testify as to what I did for that company as its attorney or as to information acquired by me as its attorney. In my answer to the direct interrogatories I have not disclosed any confidential communications between myself and the Cobre Grande Copper Company, I have only spoken of suits and proceed-
104 ings which were matters of record, and most of which were commenced and of which I acquired knowledge before I became attorney for the Cobre Grande Copper Company.

I have not volunteered to testify as against the Cobre Grande Copper Company as to matters which came to my knowledge as such attorney. I am being examined as a witness under a commission issued from the Arizona court and I have testified only as to such matters as to which I understand I am compelled to testify.

Plaintiffs' counsel then read in evidence promissory note for $23,000, made by J. H. Costello, as follows:

"$23,000. PHŒNIX, ARIZONA, December 16, 1899.

Ninety days after the Cobre Grande Copper Company has obtained possession of its property in Mexico, I promise to pay to the said Cobre Grande Copper Company at its office in Phœnix, Arizona, the sum of twenty-three thousand ($23,000) dollars in United States gold coin, with interest thereon at the rate of seven per cent. per annum from date until paid.

J. H. COSTELLO."

It was admitted that the above note of $23,000 was returned to Costello by the Cobre Grande Copper Company subsequent to December 12, 1900.

Plaintiffs' counsel now read in evidence the deposition of Grant R. Bennett, a witness for the plaintiffs, taken April 25th, 1902:

105 GRANT R. BENNETT, a witness called on behalf of the plaintiffs, examined by deposition, testified as follows:

My age is thirty-eight; residence New York city, and occupation lawyer.

My knowledge of that agreement has been obtained from reading it after it was executed. I took no part whatever in the conferences or consultations with reference to it, and which led up to its making. I was not present at the time it was signed, executed and delivered, nor was I present at any of those meetings. I never in any way, shape or form, by writing or verbally, gave my consent or the consent of A. W. Hallenborg, whom I represented, to that contract, or my approval. The only conversation I had with anyone immediately prior to the consummation of that contract was a very general conversation with Mr. Gage, the purport of which was that unless our clients whom I represented could buy all of this stock, which was called the Jerome stock, and which had been in the pooling agreement and previous option contract, that he apprehended he would be compelled to make terms with Mr. Greene. Without stating accurately, and upon my memory, my recollection is that that conversation with Mr. Gage was on the Monday of the week in which the contract with Mr. Greene was executed. During all that week at various times upon receipt of telegrams from Mr. Hallenborg, I advised particularly with Mr. Gage, stating to him that Mr. Hallenborg would not consent to the contract and on the contrary desired to resist it and to prevent its consummation in every possible way, and that he had so instructed me by telegram.

I was present in Phœnix, Arizona, as an attorney representing A. W. Hallenborg for a period during the months of October, November and December, 1900, except a short time when I was absent in New York. My principal purpose in going there was to obtain the contract for Mr. Hallenborg and his associates of a majority of the shares of the Cobre Grande Copper Company. John H. Costello was personally present during much of the time.

106 It is a fact that various forms and memoranda were drawn up and typewritten and discussed and considered and debated looking to the securing of the option above mentioned, and some of them were in substantial accordance with my instructions from Mr. Hallenborg.

Mr. Hallenborg did, in response to my telegram, wire me his acceptance of a certain contract and placed in the Phœnix Bank of Arizona, his proportion of the money to be paid under the terms of such contract, and which would give him and his associates a control of the majority of such stock. There were various complications

in getting the different parties together which delayed the execution and delivery of this contract until my return to New York, and when I came back to Phœnix I found that conditions had changed and that it would require considerable more immediate cash to secure the contract than at first.

The forms of other contracts were drawn. Their terms were generally acceptable to Mr. Gage, but they were not ratified by the Cobre Grande Copper Company, and I think their terms were generally acceptable to Mr. Hallenborg. I cannot swear whether these contracts were satisfactory to Mr. Costello or not; he was on the ground and represented by attorneys. It is a fact that these negotiations were kept up to the first week of December, 1900. I cannot say whether nothing resulted therefrom.

I will state that my presence in Arizona for Mr. Hallenborg was for the general purpose of getting control of the Cobre Grande Copper Company and a majority of the shares of its stock, in order to conduct the litigation and end it and make all the shares of stock profitable to the stockholders. I cannot answer the question otherwise.

I have examined the pooling contract of November—1900 (unexecuted). I am unable to state as a matter of law that A. W. Hallenborg and J. H. Costello were the persons interested in said contract. I do not know whether L. H. Chalmers was the agent of Hallenborg and Costello or not. I am very certain that the
107 plaintiff, Hallenborg, was dissatisfied with the fact that Mr. Greene had apparently secured the management of the Cobre Grande Copper Company, because he expected thereby to lose all the money he invested in the company. I don't know the reason for the institution of these proceedings, because I didn't bring them.

This unexecuted contract of November —, 1900, appears to have been one of many of those forms of contract drawn by various parties or their attorneys for the purpose of vesting in Mr. Hallenborg and his associates the control of the Cobre Grande Copper Company. I am quite certain that I didn't draw this contract. I do not remember its terms and I cannot state that they were satisfactory to Mr. Hallenborg, because I didn't advise him of the terms of this contract. I do not know whether Mr. Costello objected to it or not.

My recollection was that I was in Phœnix on the 22nd day of October, 1900, that I arrived there on the 19th day of October, and that I remained there until about November 17th.

I was present during most of said trial. I believe that a motion was made to admit me to practice in that court, which the records will probably show. I did not take any active part in the trial.

I did confer with the attorneys, and I would prefer to leave it to them whether I rendered any assistance or not.

So far as I acted in that trial, I represented the plaintiff- by courtesy of the plaintiffs' attorneys. Otherwise, while I was at Phœnix, I represented Mr. Hallenborg.

I am the same Grant R. Bennett who signed a pooling contract

placing 115,000 shares in Mr. Gage's hands and the signature A. W. Hallenborg to that contract was signed by me. I have explained in my direct examination the facts and circumstances under which the contract was signed. All the time I was in Phœnix until December 15th, I was acting under a written power of attorney and I have not that power of attorney now and have not had it since I left Phœnix the last time.

108 That power of attorney was revoked in writing by telegram by Mr. Hallenborg. I received the telegram of revocation I think on the morning of December 15th. I at once advised Mr. Gage personally of that revocation, also Mr. Chalmers, and I think my recollection is that Mr. Gage advised me he had received a similar telegram.

I was introduced to Mr. Hallenborg by Mr. Dowe, and I understood that Mr. Dowe at the time I was in Phœnix during the month of October and a portion of November, was the attorney and representative of Mr. Hallenborg in New York. As such attorney and representative I did communicate with him by letter and telegram.

I wrote a number of letters to Mr. Dowe, copies of which are not now accessible to me. I do not remember what telegrams I received from William Henry Dowe, formerly attorney at law, practicing at 35 Nassau street, during my first visit to Phœnix, but all or any telegrams received from me by him or sent by me to him were when we both represented as attorneys our client, Mr. A. W. Hallenborg.

During the time I was in Phœnix I consulted with Mr. Gage and Mr. Chalmers very freely and advised with Mr. Costello and his attorney, Mr. Herndon.

I was not consulted with reference to negotiations which led up to the contract between Mr. Gage and Mr. Greene of the 12th of December. Prior to its execution I knew absolutely nothing of its terms, except in a general way what I might have learned from Mr. Gage on the Monday before it was executed, when he informed me in substance that he thought he would have to dispose of the holdings to the Greene crowd. He did not tell me at that time or at any other time prior to the execution of the contract what the terms or the provisions of the contract were or were to be. Nor was I asked or evidently expected to be present at any of the conferences or consultations prior to the drafting of that contract, nor was I present at the time it was executed or delivered, and unless I am mistaken in my memory, I was not given a copy of the contract until 12 or 24 hours after it had been executed and delivered.

109 I think it was the day after the contract was signed that a copy of it was given to me either by Mr. Gage or Mr. Chalmers, and immediately upon receipt of the same I advised Mr. Hallenborg of its terms.

During the negotiations and up to the time of the execution of the contract giving to Mr. Greene the control of the Cobre Grande Company, I did not consult with the attorneys or Mr. Gage about this contract, I did not approve of said contract, I did not suggest

changes and alterations in the proposed contract; I did not know any of the terms or provisions suggested for said contract, and of course no suggestions of mine were incorporated in said contract, nor did I approve of the said contract after it was drawn. But after this contract was made and executed, which by its terms seemed to vest a control of the majority of the shares of the Cobre Grande Copper Company in Mr. Greene and his associates, it seemed to me that Mr. Hallenborg's shares constituting but a small minority, would be rendered worthless and valueless by the conduct of the company by those in whom the control was vested. I therefore did believe that it was a wiser business proposition for Mr. Hallenborg to accept the terms of such contract, take the best money he could out of it then, and I so advised him. In other words, I deemed it best for Mr. Hallenborg to make the best of what seemed to be a bad condition.

During these negotiations I did not have any conversation with Mr. Barnes concerning this contract. After the negotiations were concluded and the contract was executed and delivered, I may have said to Mr. Barnes in substance that I believed under the circumstances it might be best for Mr. Hallenborg to accept under the terms of the contract and take his money, but I did not state I approved of the contract or accepted it, and I stated explicitly to every one with whom I spoke upon the subject, that Mr. Hallenborg was opposed to such contract, that he was determined to resist it, and that he had not authorized me to accept it. I may have said to Judge Barnes that I would advise Mr. Hallenborg to accept
110 that contract, and as a matter of fact I did so advise him, but I did not state that I had no doubt that he would do so.

I did not in substance say the same thing to Mr. Greene on any occasion in Phœnix.

I did not give Mr. Greene or Mr. Barnes to understand that the settlement made, culminating in the contract, met with my approval, or that Mr. Hallenborg would accept the same, but I may have said that I thought it would be best for him to accept the same, as I have stated before.

Plaintiffs' counsel offer in evidence articles of incorporation of the Cobre Grand Copper Company, dated April 22, 1899.

Admitted and marked Plaintiffs' Ex. Articles.

Plaintiffs' counsel offer in evidence part of the minutes of meeting of the directors of the Cobre Grande Copper Company held December 13, 1900, containing motion and resolution ratifying agreement of December 12, 1900, as follows:

"Moved by Con O'Keefe that the contract entered into by E. B. Gage, president, on December 12, 1900, reading as follows (here follows the agreement of December 12, 1900, which is already in evidence, Plaintiffs' Exhibit 3), be and hereby is ratified; showing that the motion was seconded by W. M. Adamson and unanimously carried."

Admitted in evidence.

Plaintiffs' counsel offer in evidence letter from E. B. Gage, trustee, to A. W. Hallenborg, dated December 17th, 1900.

Admitted and marked Plaintiffs' Ex. 7.

Plaintiffs' counsel offer in evidence letter dated December 24th, 1900, from A. W. Hallenborg to E. B. Gage.

Admitted and marked Plaintiffs' Ex. 8.

111 PLAINTIFFS' COUNSEL: We desire to amend the complaint by withdrawing the allegations in paragraph three stating the circumstances under which the property of the Cobre Grand Copper Company was obtained by Mr. Greene, and to state in lieu thereof, that those claims and charges were made at that time by the Cobre Grande Copper Company. The portion of the complaint which we now desire to amend reads as follows:

"Since prior to January 1, 1900, the Cobre Grande Copper Com-
"pany has been engaged in a series of litigations with the defendants
"William C. Greene, George Mitchell and their associates, confede-
"rates and agents, arising out of the following facts:"

We desire to amend so as to read as follows:

"Since prior to January 1, 1900, the Cobre Grande Copper Com-
"pany has been engaged in a series of litigations with the defend-
"ants William C. Greene, George Mitchell and their associates, and
"confederates, which litigations are as follows, and were based upon
"the claims, charges and allegations made by the Cobre Grande
"Copper Company in that behalf."

Motion to amend granted.

Judge Barnes opened the case on behalf of the defendants.

Defendants offer in evidence stenographer's transcript of the case of the Cobre Grande Copper Company *v.* William C. Greene and others, defendants, No. 3,437, from the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa.

Objected to by plaintiffs' counsel on the following grounds:

112 First. That the action was between different parties from the present action.

Second. That the record contains a transcript of the evidence in that case which could not under any circumstances be evidence in the present case.

Third. That the judgment in that case was rendered subsequent to the time of the beginning of the present action.

Fourth. That the judgment referred to was obtained in an action between the Cobre Grande Copper Company and Greene and others, after the making of the agreement of December 12th, 1900, already in evidence, and after William C. Greene had obtained control of both sides of the litigation in that action, and therefore the judgment is on its face collusive and void.

THE COURT: The contents of the judgment roll is made evidence by the practice act. The objection will be overruled to so much of

the proffer there as constitutes the judgment roll under paragraph 810 of the Revised Statutes of 1887.

Plaintiffs except.

Admitted, Defts' Ex., Judgment Roll.

Defendants' counsel offer in evidence judgment roll in an action in the district court of the thirty-fourth judicial district of the State of Texas, between the Cobre Grande Copper Company, plaintiff, and the Consolidated Kansas City Smelting and Refining Company and others, defendants, No. 3,211.

Objected to by plaintiffs on the ground that plaintiffs were not parties to the action, nor represented in any way therein.

113 The COURT: It may be received subject to the objection.

Plaintiffs except.

Admitted, Def'ts' Ex., Texas Judgment Roll.

Defendants' counsel offer in evidence contract or power of attorney to E. B. Gage; dated October 24, 1900.

Objected to by plaintiffs' counsel as immaterial and irrelevant.

Objection overruled, plaintiffs except.

Admitted in evidence Def'ts' Ex., Authorization.

E. B. GAGE, called for the defendants, being duly sworn, testified as follows:

Direct examination:

(Paper shown witness.) That is the power of attorney that was handed to me by Mr. Grant R. Bennett.

Defendants offer in evidence power of attorney from A. W. Hallenborg to Grant R. Bennett, dated October 13, 1900.

Objected to by plaintiffs' counsel as immaterial and irrelevant.

Objection overruled.

Admitted Def'ts' Ex., Bennett Power.

Plaintiffs except.

I am one of the defendants. I don't know the plaintiff Hallenborg. Never saw him in my life. When this advance of $40,000 was made there was no understanding that $37,500 of the money should be used to pay an installment of the purchase price of the mines at such times as the court should decide it was payable. I know of no such understanding. The only written instrument that I had showing the status of Hallenborg's stock was the power of attorney signed by Grant R. Bennett, Hallenborg's attorney. Hallenborg notified me on December 15th by telegram that he had revoked Bennett's power of attorney. I don't recollect that I

114 had any correspondence with Hallenborg direct about the pooling contract.

Telegram offered in evidence by defendants, as follows:

"NEW YORK, N. Y., Dec. 15th,

"E. B. Gage, Presscott, A. T.

"I have revoked power attorney given Grant R. Bennett.

"A. W. HALLENBORG."

I was director and president of the Cobre Grande Copper Company at one time. My resignation was acted upon April 3, 1901. I resigned both as director and president and the resignation was accepted. Since that time I have not had any official connection whatever with the company. I know Costello, Adamson, Wood and O'Keefe. They were also directors and resigned at the same time I did and have had no connection with the company since to my knowledge. Under the pooling contract, already in evidence, 115,000 shares or thereabouts passed into my hands as trustee. I had the stock in my hands. I met Benjamin Orne once. I had no negotiations with him directly in regard to the matter, but Mr. Anderson T. Herd came out there with a power of attorney from Mr. Orne, I think in January, 1900. An option was given to Benjamin Orne for the purchase of approximately the same stock.

Agreement, dated January 5, 1900, between E. B. Gage, trustee, and Benjamin Orne, shown witness and identified as genuine, and offered in evidence by defendants' counsel.

Objected to by plaintiffs' counsel as immaterial and irrelevant. Objection overruled.

Admitted Def'ts' Ex. C, pooling contract, January 5, 1900.

Plaintiffs except.

115 They did not take up the stock under that contract.

Agreement of March 30, 1900, between Gage and Chalmers shown witness and identified as genuine, and offered in evidence by defendant's counsel.

Objected to by plaintiff's counsel as immaterial and irrelevant.

Objection overruled.

Admitted Def'ts' Ex. D, pooling contract, March 30, 1900.

Plaintiffs except.

At that time, March 30, 1900, the Cobre Grande Copper Company was in litigation. We needed money to carry on the expenses of the litigation. We did not have it. The purpose of that contract with Chalmers was to provide money for that purpose, to conduct the litigation against Greene and the other defendants. They did not take up the stock under that option and it lapsed on account of their failure to comply with the the terms.

(Witness shown contract dated June 2, 1900, between Gage and Chambers). This contract was entered into.

Offered in evidence.

Objected to by plaintiffs' counsel as immaterial and irrelevant.

Objection overruled, plaintiffs except.

Marked pooling contract June 2, 1900.

There was about 16,000 shares purchased by Mr. Hallenborg and Mr. Costello under that option, as I recollect. The purpose of that agreement was to provide money to carry on the littigation. Mr. Hallenborg and Mr. Costello purchased these shares at that time from some of the stockholders who were restless and dissatisfied. That was a part of the 115,000 shares in my hands under the pooling arrangement we had at that time.

116 Defendants' counsel offer in evidence telegram Gage to Dort, May 31, 1900; also telegram Dowe & others to Gage, dated June 1, 1900; also telegram Costello to Dort, dated June 1, 1900; also letter William H. Dowe to Chalmers, dated June 2, 1900; also letters from Chalmers to Dowe, dated June 2, 1900.

Plaintiffs' counsel object to each and every one of these papers as immaterial and irrelevant.

Objection overruled.

Admitted marked Def'ts' Ex. E. telegrams.

Plaintiffs except.

That agreement lapsed also. It was under that option that the 16,000 shares of stock that I spoke of were sold to Mr. Hallenborg and Mr. Costello. The litigation was going on at this time. The indebtedness of the company had been increasing; it was in debt at this time. Grant R. Bennett came out to Phœnix and sought to obtain another option, as I understood, for Mr. Hallenborg, Mr. Costello and others. He then had the power of attorney from Hallenborg to Bennett, already in evidence. Costello was there in person. There were several contracts discussed and drawn up, but never consummated or signed. Mr. Bennett was satisfied with one or two of them, but Mr. Costello was not and failed to sign. These negotiations continue up to the middle of November. Mr. Bennett went east at that time and requested me to hold the matter if I possibly could, until he could get a consultation with his principal, who would probably return to the territory with him, and I told him that I would use my best efforts to hold the stock together until he could return, he promising to return about the first of December. He returned about the third of December, I think, and stated that Mr. Hallenborg would follow in a day or two and no action was taken; simply waiting for Mr. Hallenborg to appear, and a few days later between that and the 12th, he notified me that Hallenborg was not coming. I was holding it
117 off because I desired to give Hallenborg an option, if he desired it, in preference to anybody else. I held off at his suggestion as long as I could. I held the stock under the pooling arrangement up to the 1st of December and then that expired and gave the people an opportunity who were in the pooling contract to withdraw their stock. Mr. Greene's agents were very active in the purchase of outside stock and were making offers to the owners of the pooling stock. After the first of December they were threatening to revoke their power of attorney and sell their stock for what-

ever they could, at the price they could get. There were brokers in the city buying the stock—Orr & Jones; they were going to everybody that they knew to be owners of stock. I was informed that they were buying for Mr. Greene and for Mr. Logan, Mr. Greene's attorney of New York. I told Mr. Bennett and Mr. Costello that I could not hold these parties together any longer unless they would do something and the situation seemed to be a desperate one to me; that I was informed by my attorney for the Cobre Grande Copper Company, whom I consulted, that there was no hope of winning the case of the Cobre Grande Copper Company, the suit tried some time in October. I asked legal advice. It seemed to me that they would obtain control of the stock of the company, then if the judge went against us, the assets of the company would be practically wiped out; that as a business proposition it was desirable to compromise the case if it could be done. I was informed that the Mexican suit had gone against us; it barred our further proceeding there unless a new suit was brought. I have referred to the suit brought by the Cobre Grande Copper Company against Greene to enjoin the delivery to Greene of the papers deposited in escrow in the Phœnix national bank. I had an interview with Mr. Greene and his attorney; Judge Herndon and myself on one side and Mr. Greene and his attorney on the other. Prior to that I consulted Mr. Costello and all the directors, and Mr. Costello and Grant R. Bennett were familiar with
118 my views on the matter. The stockholders as far as they were accessible were fully informed at all times. They advised the compromise. There was no concealment from anybody. All the directors were present when the contract of December 12th, was drawn up. The directors advised it. Grant R. Bennett was in Phœnix at that time and was informed by me what the situation was and what my views were. I don't recollect just what passed between us. I don't recollect that he made any objection to it. As soon as a legal meeting could be held after the contract of December 12th, there was a meeting of the board of directors. I don't recollect the date. They confirmed my action in executing the contract and afterwards there was a meeting of the stockholders called for the purpose to confirm the action of the board of directors, which was done. I made the first payment of fifty cents per share immediately. It was not accepted by Mr. Hallenborg; the other stockholders accepted it. In making that agreement of December 12, 1900, I deemed my action for the best interests of the Cobre Grand-Copper Company and all stockholders.

There was a payment of $37,500 which fell due on November 26, 1899, under the original contract between Greene and Mitchell, which was assigned to the Cobre Grande Copper Company.

Q. Referring to the agreement of December 12, 1900, will you state what the $25,000 and the two amounts of $30,000 therein mentioned, making $85,000 was for?

Objected to by plaintiffs' counsel on the ground that the agree-

ment speaks for itself and that the question calls for a conclusion of the witness.

Objection overruled. Plaintiffs except.

A. $25,000 was to pay a note of the Cobre Grande Copper Company which was given for stock which was contributed by different stockholders to the extent of $25,000 to Sandoval & Co. The two amounts of $30,000 as stated in the contract was $30,000 in cash and 3,000 shares of stock which they had the privilege of
119 paying in cash for the stock instead of delivering the stock, making $60,000, was to apply on the notes and debts of the Cobre Grande Copper Company, outside of the $25,000. The notes outstanding, so far as we could judge at that time, was approximately $60,000, including the interest, as I understand it. The floating indebtedness I did not know what they would be. The notes given to New York parties was the indebtedness discussed and provided for by this $60,000. I did not know at that time what notes Mr. Hallenborg held. This was for money that was advanced by New York parties; that was the intention. Mr. Hallenborg claims a portion of it, not all of it. I had provided for all that I could; that I could get from Mr. Greene. Mr. Herndon said that he thought my salary and expenses should be provided for also and Mr. Greene voluntarily allowed 5,000 shares of stock for that purpose. The 5,000 shares mentioned there for the use and benefit of L. H. Chalmers, Baker & Bennett and Herndon & Norris, was for their services as attorneys in the Cobre Grande case. I don't know how many suits were pending. I don't recollect now. It was for their services in all these matters. There was an understanding in the meeting that if the notes that were held in New York were not presented, that I should turn that $60,000 over to the treasurer of the Cobre Grande Copper Company, and I did so and got a receipt from the company for that amount which I produce.

Receipt read in evidence, as follows:

PHŒNIX, ARIZONA, April 3, 1901.

Received of E. B. Gage, trustee, the sum of sixty thousand ($60,000) dollars, money due the Cobre Grande Copper Company, arising out of the fulfillment of the conditions of the contract of December 12th, 1900, between William C. Greene and the Greene Consolidated Copper Company, on the one hand, and E. B. Gage and the Cobre Grande Copper Company on the other hand,
120 being the same sixty thousand dollars mentioned in said contract to be paid to said E. B. Gage by the said Greene, and the Greene Consolidated Copper Company.

WM. H. BARNES,
Treas. Cobre Grande Copper Company.

(Unsigned agreement dated November, 1900, shown witness.) I don't say that I can positively identify that paper. It is similar in

terms to one that was submitted to me but there is nothing by which I can identify it. The one that was submitted to me was in the same substance and form.

Paper offered in evidence by defendants' counsel.

Objected to by plaintiffs' counsel as immaterial and irreleva nt. Objection overruled, plaintiffs except.

Admitted Def'ts' Ex. Pooling Contract (unexecuted).

I think I opened the negotiations which led up to the contract of December 12th; I made the best terms I could. Negotiations were continued a day or two. I represented to Mr. Greene that the lawyers were claiming $50,000 for their services and wanted him to pay that. I suppose there was a debt due them for their services. They had rendered services and it was hard to fix lawyers' fees. They had not been paid. I think Greene said that he would buy all the outstanding stock that would be offered at $2.50, the same price he paid me. I paid $60,000 to the treasurer of the Cobre Grande Copper Company and I paid another debt of the company of $25,000. At that time I had paid out some money for the Cobre Grande Copper Company, quite a considerable amount; I don't recollect how much.

Cross-examination:

Nothing came of the contracts for options for the sale of
121 stock. The first one that took effect was that I made with Mr. Greene. At that time I was negotiating in both capacities. The new board of directors of the Cobre Grande Copper Company were not all present when we had the preliminary meeting in consulting about that matter. They were present at the time of the execution of the contract. I cannot recollect who of the stockholders were present at the ratification. Mr. Bennett was there representing Mr. Hallenborg. I don't know whether he read the contract before it was executed or not. He was not present at the negotiations between me and Greene. I called his attention to the provisions of the contract. I handed him a copy of the agreement. He was not present at the stockholders' meeting when the approval was adopted, nor at the meeting of the board of directors that ratified it. Judge Hawkins was present. The first I heard of Mr. Hallenborg was on the sending of the check; that is the first direct information that he would acquiesce in the terms of the contract. I think I had a telegram from Hallenborg during October, but I don't recollect what they were; they did not bear upon the question of the contract. Bennett said that Hallenborg was not satisfied with the position he had taken in this matter and had revoked his power of attorney. It was afterwards I got that telegram repeated to me from Prescott; I was in Phœnix. Mr. Hallenborg's attorney was present at the meeting ratifying this contract and protested. I was president of the Cobre Grande Copper Company on the 25th of Novem-

ber, 1899, when the suit was brought by the company against Greene in the third district. I did not think, personally, that we had any grounds to stand on. Hallenborg was informed of all the conditions of the case. I obtained and used money for the purpose of conducting the litigation. The $25,000 that I received was for the purpose of paying an obligation of the company; it was payable to me as trustee for certain stockholders of the Cobre Grande Copper Company, whose names I don't recollect. The money was paid to them. I did not make any effort to apply the $60,000 to
the payment of the New York notes; the notes were sent out
122 to me and then withdrawn. I don't think any notices were
sent to any of the creditors to the effect that the money was collected for the payment of the notes they held. I had not notified any of them except possibly Mr. Shirley; he sent his notes to me and afterwards withdrew them. At the meeting of April 3, 1901, when I resigned, I think all the directors were present. Judge Herndon, Mr. Chalmers, Mr. Greene and I don't know who else. The purpose of the meeting was to act upon the resignation of the officers of the company in obedience to the contract of December 12th. I resigned and Mr. Greene was elected president. He was also president at that time of the Greene Consolidated Copper Company, the adversary of the Cobre Grande Copper Company in the litigation and at that time the suits were pending and undetermined. I knew that Mr. Greene was president of the other company and that he was a defendant in that action. Mr. E. B. Knox was treasurer of the Cobre Grande Copper Company at that time and he resigned and William H. Barnes was elected in his place. I knew that Mr. Barnes was counsel for Mr. Greene. I knew at the time that these new directors were mainly counsel for Mr. Greene, who was defendant in the case which we had been prosecuting. I knew the new board were associated with Mr. Greene as counsel after they were elected. I returned Mr. Hallenborg's stock to his attorney, Judge Hawkins, after I had sent him the check, and he returned it to me in December, some little time after; I should say it was longer than a few days, and think within a few weeks. The action in the third district court in Phœnix was begun November 25, 1899, as I recollect. I don't recollect the original counsel employed for plaintiff in that case. Herndon & Norris, Baker & Bennett and L. H. Chalmers were in that case afterwards for the plaintiff. Those are the gentlemen to whom this 5,000 shares of stock was to be given for lawyers' fees for conducting the legal business of the company up to practically the time that it passed into the hands of Mr. Greene.
I could not tell just when each one started in. My recol-
123 lection is that it was the beginning of this suit in the third
district. They conducted the litigation in Mexico, El Paso and other places. Mr. Chalmers went to Mexico. I think Mr. Baker went to Mexico once or twice. It was on this litigation with reference to the Cobre Grande property in Cananea. There was a litigation in Mexico. The litigation in El Paso was with reference to

copper matte. Something was paid the attorneys before this, I can't say how much. No bill was presented to me in writing. They told me that they claimed that amount for their services. No statement was made by the treasurer of how much had been paid them. It was over a $1,000. I don't know whether it was over $5,000; I don't think it was over $10,000; it was between $1,000 and $10,000. I don't know to whom it was paid or whether to all three. I did not investigate at that time. They told me what their claim would be and I claimed that much of Mr. Greene. He paid the attorneys in the case and they claimed so much and he excepted to 5,000 shares of stock. I cannot say what the services were. I was not present at the trial in Phœnix. I think Mr. Jamison made the argument in the case. I don't know who examined the witnesses. When I brought that action I don't know whether I consulted any of those lawyers about it. I presume I directed them to bring the action; I don't recollect. I think a resolution was passed directing the action to be brought, but I don't recollect. I presume I consulted with the lawyers for the plaintiff, the attorneys for the Cobre Grande Copper Company, at the time the action was brought. They advised me that they had a good cause of action at the time, and I considered it my duty as president of the company to bring the action. I understood at that time that the action involved practically all the property of the company. The case was tried some time in October, 1900, before Judge Street. I don't know how long the trial took. Between October and the 12th of December there had been no decision rendered by Judge Street in that case, and I had no previous communication as to what his decision
124 would be and no means of getting any. My attorneys advised me that they did not think that there was any possibility of winning the case. Judge Herndon told me that when he came to Prescott after the trial and I was so informed by Baker & Bennett, practically about the same time or soon after. I don't recollect how soon after. They so advised me in December, soon after Judge Herndon spoke to me about it. They said they thought they had not made a case we could win under. I don't know that the points were given to me. I think it was because they had not shown sufficient cause why the $37,500 was not paid. Mr. Jamison always advised that he would win the case. I understood he took a prominent part in it. He did not advise the settlement of December 12th. The object of giving the options in evidence was, in the first place, to get funds to conduct the litigation and try to get possession of the property in Mexico, and money was furnished for that purpose in New York. Mr. Orne, as I understood, furnished the first $40,000. I never heard of Mr. Hallenborg until along the summer some time. I was informed that he had an interest in the option that was given to Mr. Chalmers. I think the second option. I don't recollect that Mr. Orne was connected with that. It was an option to New York people to purchase the stock of the Cobre Grande Copper Company. I had talked with

Grant R. Bennett at Phœnix on that subject, and understood from him that he represented Hallenborg, who wanted to get control of the stock and wanted another option on it with the idea of getting control of the majority of the stock, and that Mr. Bennett was there representing him for that purpose. The attorneys in New York representing the Cobre Grande Copper Company in the copper matte litigation, were Dowe & Hartridge, and subsequently to December 12th I removed them as attorneys for the Cobre Grande Company and appointed in their place either Logan, Demond or Harby; I think Mr. Harby was the one appointed. I don't know whether Mr. Harby acting afterwards, was a member of the firm of Logan, Demond & Harby or not. It was Mr. Harby or that firm. Mr.
125 Logan is the gentleman I mentioned as purchasing stock for Mr. Greene. At the stockholders' meeting Judge Hawkins, of Prescott, protested against the proceeding on behalf of Mr. Hallenborg. I turned over the $60,000 to Mr. Barnes in a check on the Consolidated National Bank of Tuscon. That was the same Mr. Barnes that was attorney for Mr. Greene. Mr. Costello in the meeting wanted to know what would be done with that $60,000, provided the notes were not presented, and it was discussed and considered as an asset of the Cobre Grande Copper Company, and I said that I would turn it over to the treasurer of the company; the money didn't belong to me. I didn't have in my mind just at that time how the notes were divided, who held them; but I had an approximate idea of about how much was due in New York for advances made for which notes had been given, and I endeavored to cover as near as I could; I tried to get all I could. I did not then know that Judge Hawkins represented Mr. Hallenborg. I don't recollect that I ever notified any of the New York creditors. I cannot state why it was not stated in the agreement of December 12th, 1900, that there was a fund for the creditors. I didn't draw the contract. I am not sure who the attorneys were who drew it. Judge Herndon, Judge Barnes, I think, were present. The $25,000 was applied to some of the creditors of the Cobre Grande Copper Company, to the people who advanced out of their holdings, stock to the extent of 10,000 shares, which was given to Sandoval for his service in Mexico. I have not the list with me. There was Dort and Adamson and a good many of them who contributed a small portion of their holdings; quite a good many. I don't know of the application of any particular sum towards my salary out of this money obtained under the agreement of December 12th. I retained what I had. The contract was 5,000 shares of stock. They afterwards paid me $50,000 in lieu of that. I don't know how much of it was for salary.
Might call it all salary or expenses or anything else—salary
126 and expenses. I don't recollect how it was divided. There was a salary of $15,000 a year voted me at one of the meetings. I think that was November, 1900. That was the first vote for salary attached to the president's office.

Redirect:

I didn't make any application for money to carry on these suits to the New York stockholders; they made the application; they furnished the money and instructed me to go on with the suits.

L. H. CHALMERS, called for the defendant, being duly sworn, testified as follows:

Direct examination:

I know Anderson T. Herd; he and I employed the attorneys in El Paso to bring the suit there, the record of which has been introduced in evidence. He was representing Benjamin Orne, whose name appears with Hallenborg's in some of these options. It was a part of the consideration for the options to purchase stock that the debt of $40,000 that Mr. Hallenborg now claims, was to be released. I went down to New York with the aim and object of raising money to carry on this litigation. I did all I could. We would have sold the stock at $1.00 a share many times. The highest price I found it possible to sell the stock at was $2.50 a share. Hallenborg offered to take it at the same rate; to take an option upon it. He and Costello bought 16,000 shares at that figure. There was no other bidder who offered to take it at $2.50 a share. Costello had an option in July at $2.50 and bought considerable of the stock at that time. I had forgotten that. I drew the articles of incorporation of the Cobre Grande Copper Company and have been acquainted with it since its inception. I know the services rendered by the lawyers. Practically all the time of Herndon & Norris and myself, or a large portion of it, was taken up for the latter part of 1898, 1899 and 1900, up to the time the contract
127 was made. We brought from ten to a dozen law suits and we oversaw the litigation in Mexico. I took frequent trips to the city of Mexico, to El Paso, Nogales, Hermosillo, and once down to New York. Attended to all sorts of motions in those different cases. We were overseeing the whole litigation in Arizona, in several of its courts; in Maricc; a county and Cochise county; also motions in Pima county; trouble in Nogales transactions out of court. It took me nearly all my time for six or eight months to keep Mr. Wood out of jail alone and overseeing the Mexican litigation; going and seeing about it; employing lawyers; my whole time was practically taken up. I practically abandoned my office from the latter part of 1898 until the settlement. The time of Baker & Bennett was more taken up in court matters. I would telegraph them, Baker & Bennett, or Mr. Herndon, to go here or there and send them all over the country. Mr. Herndon is generally considered a good man. When this matter of compromise came up Mr. Gage spoke to me about it, and I told him that I had expected to get as much as $50,000 out of this litigation myself, and we talked it over and we concluded we would hold out for $50,000 and try to

collect it. That was an extremely reasonable compensation. I was not present at the time of the decision of Judge Street. At the time the submission to him for decision I was the attorney for the Phœnix national bank as well as for the Cobre Grande Copper Company. I approached Judge Barnes in regard to the submission of the case. I told him that the bank was enjoined from passing over the escrow papers; that Hallenborg had brought a suit in Prescott, claiming that the contract of December 12th was fraudulent, and that there had been demands made upon the bank for the papers by Greene and Mitchell and different parties, and we did not know what to do with those papers, and I asked Judge Barnes if the case ought not to be submitted and a decision rendered, and he agreed with me; went into the courtroom at Phœnix and announced to the judge who was on the bench that the attorneys for both sides of the case
128 desired that it be submitted. That is the last I heard of it until it was decided. Judge Barnes was not in court at that time. In making up my estimate for the services of myself and associates counsel, I took into consideration not only the time which was employed in attending to the litigations and outside matters, but also the amount and the questions involved and the value of the property. I recall that Edwards & Petticolas were attorneys in El Paso for the company and were paid by the company.

Cross-examination:

It was after December 12, 1900, that I went into court at Phœnix and asked that the case be decided. It was after Mr. Greene had become president of both companies, and after the time when directors of the Cobre Grande Copper Company were elected friendly to him. I don't remember the date when the case was decided. My recollection is that it was 4 or 5 days after it was submitted before the decision was rendered. The date of the decision was not law day—Saturday. Mr. Jamison was there when the case was submitted. I am not certain that it was on Saturday. The record shows the decision was rendered on April 15th, 1901. I have now stated all I know with reference to the submission of the case to Judge Street. I was present and took part in the trial of the case between the Cobre Grande Copper Company and Greene and others in Phœnix in October, 1900. Mr. Jamison took a very active part in that trial. He examined the witnesses. He and I were partners at that time. So far as my office was concerned he took charge of the preparation of the case for trial. A very active part. He was quite familiar with the case. He was very sanguine of success, and so was I. I repeatedly stated that to Mr. Jamison. I believed the action was well brought and so did the others. All the suits referred to were in relation to the controversy over this Cobre Grande Copper Company property situate in Sonora, Mexico. The two parties were, the Cobre Grande Copper Company on one side and William C.
129 Greene and George Mitchell on the other. These controversies all arose over the struggle of the Cobre Grande Copper

Company to regain possession of the property and the product of the mines—matte and so on; everything arising out of it. The amount involved in the suit in Maricopa county was absolutely nothing; it was merely the possession of the escrow papers. We thought the mine was of great value, and that the winning of that suit was a preliminary step to get a good standing in Mexico. We could take the deeds to Mexico and put them on record and bring our action there. Mr. Barnes was counsel for Mr. Greene and Mr. Mitchell and I spoke to him about the submission five or six days before; it was early in April, say, the 3rd, 4th or 5th. I had no consultation with anyone on that subject. I considered myself in absolute command of the Cobre Grande litigation. I did not state anything to Judge Street at that time. I think that the cause had remained on submission before him all the time previous to that. The agreement of December 12th required that the action be dismissed, but that was not done, and I had no consultation with anyone with reference to it. Judge Barnes prepared the judgment in that case. He sent it over to me for my approval, and I marked it approved, according to the practice here. The judgment did not come into my hands until after the decision had been announced from the bench. I suppose that was the day it was filed, the 15th of April. My recollection is that he sent the judgment over to Tuscon, where his office is. In this present action I appear of record for the Cobre Grande Copper Company and have taken part in the trial and have actively resisted the plaintifis' suit. I don't know who is president. I think Scott White is secretary. I have appeared here principally by the direction of E. B. Gage to look after his interest. In doing so I have seen fit to appear for the Cobre Grande Copper Company. None of the defenses were put in at his request. It was Judge Barnes who asked me to appear for the Cobre Grande Copper Company in this case. At that time he was a director of the company. We
130 discussed the situation in Mr. Herndon's office the other day. Judge Barnes is representing Mr. Greene on this trial, and has been the leading counsel on his behalf. I don't know how much was paid by the Cobre Grande Copper Company to the different counsel during the litigations; I drew out sums of money and paid them out to counsel myself. I have no doubt as much as $20,000 was paid. We had counsel all over the United States and Mexico. I think the Arizona counsel got somewhere between $3,000 and $5,000. I drew some $12,000 or $15,000, which was used for expenses of all kinds and attorneys' fees in El Paso, New York and different places. The action was brought and the money disbursed under my advice and that of Mr. Herndon and Baker & Bennett. The litigation was directed from here by J. Henry Wood and myself. The suits were brought in good faith and the money was paid out in good faith, and I think the suits were necessary.

Redirect:

Mr. Herndon and Baker & Bennett were against the theory and policy of that litigation from the start. I fought them all the time continually; they thought the chances of winning were absolutely nil on account of the failure of the Cobre Grande Copper Company to pay a certain $37,500 on the 26th of November, 1899. I contended we could win notwithstanding that. We claimed that Mr. Greene had wrongfully ousted us from the possession of the property in Mexico and thereby deprived us of an opportunity of making money that we thought we were going to make in Mexico.

NORTON CHASE, called on behalf of defendants, being duly sworn, testified as follows:

Direct examination:

The Greene Consolidated Copper Company had 21 directors at the time this contract was made with Mr. Gage in December, 1900, and about 1,500 or 2,000 stockholders, located over the United States and many parts of Europe.

131 WILLIAM C. GREENE, called for defendants, being duly sworn, testified as follows:

Direct examination:

I know J. Edward Addicks, the intervenor in this case. I have met him since the contract of December 12, 1900, and offered him $3.00 a share for his stock in the Cobre Grande Copper Company. He said: "I don't care about selling my stock; it is a pretty good investment; I think we will make a success of the Cobre Grande Copper Company."

WILLIAM C. GREENE, called for plaintiffs, testified as follows:

The par value of the Greene Consolidated Copper Company stock is $10 per share. I think it is selling on the market to-day for $26.25. It has gone as high as $50 and as low as $2.00. In February, 1901, we offered the stock to the public at $5.00 a share and paid 20 % commission for selling. The capital stock of the company was then $5,000,000; it is now $6,000,000.

WILLIAM H. BARNES, called for defendants being duly sworn, testified as follows:

Direct examination:

I was elected secretary of the Cobre Grande Copper Company the 13th or 14th of April, 1901. Mr. Gage turned over $60,000 to me as treasurer at about that time. There was some paid out [illegible]

member the payments. I turned over to the treasurer about $50,000. I am satisfied that there is that much in the treasury now. Mr. Hallenborg never demanded payment while I was treasurer. I was present part of the time at the negotiations between Mr. Greene and Mr. Gage that resulted in the contract of December 12, 1900. I didn't hear it all. The case tried before Judge
132 Street at Phœnix was submitted after the hearing of all the evidence and final argument, and the court announced that it would have the stenographer write out as much of the testimony as we desired and would subsequently render its decision. After the contract of December 12th was made, I didn't go into court myself, but I understood that the order of submission was set aside. After the final payment I met Mr. Chalmers in Phœnix one day, and he said the bank was interested in getting rid of the escrow papers, and then he spoke about this present suit. That was the first time I had heard of it. My clients had not then been served, and he said Hallenborg was complaining that the agreement was to dismiss that lawsuit in Phœnix and the other lawsuits. One of us said that if he complains about dismissing all suits we will resubmit them and had it decided. We concurred in that. My recollection is that Judge Street was holding court in Yuma at that time, and we sat down and wrote a little paper of three lines. It was agreed that the case should be decided, and we hoped at the earliest convenience of th- court, and both signed. My recollection is that it was sent to Yuma, and the next thing I heard was that the judge had decided in our favor. I wrote out the judgment in accordance with the decision as I found it to be and sent it to Mr. Chalmers' attorney on the other side, in accordance with our practice, that he might O. K. it, and send it to the judge. Counsel for Mr. Greene or the Consolidated Copper Company, never went into court and consented to the entry of any judgment in that case. The Cobre Grande stock which was bought from Mr. Gage under the agreement of December 12th, was paid for with the money of the Greene Consolidated Copper Company, and the stock was delivered to the treasurer of that company.

Cross-examination:

The Greene Consolidated Copper Company is a corporation of West Virginia. Mr. William C. Greene is president. It took
133 possession of this mining property in Sonora subject to all the rights and equities of the Cobre Grande Copper Company and a great deal of other property.

L. H. CHALMERS, recalled for defendants:

I want to make a correction. I think I stated on my examination that when I was talking with Judge Barnes that this suit had been commenced in Prescott by Mr. Hallenborg, whether it had been commenced at that time or not, I don't know. What I meant to say was that I knew Hallenborg was objecting to the whole situa-

tion. I now remember sending the little memoranda made by myself and Judge Barnes to Yuma, and I merely announced it in open court after he returned. It may be that the Phœnix National Bank had been served with an application for an injunction in this present case before the re-submission in Phœnix, but I don't remember one way or the other.

J. C. HERNDON, called for the defendants, being duly sworn, testified as follows:

Direct examination:

With reference to the 5,000 shares of stock that went to Mr. Gage under the agreement of December 12, 1900, I don't know that I can give you all that was said or even approximate it, but the question came up and I said that Mr. Gage ought to be paid for his services. He had been out a great deal of money and had spent a good part of his time for a year or more, and I said that he ought to be paid for it, and Mr. Greene said, "I can't do it; I am out just the last dollar, and I won't pay any more." Mr. Gage said to let it go, and got up and walked out; I took the matter up again and urged the payment of Mr. Gage's expenses, and his salary, and for an hour or two that matter was discussed, and finally Mr. Greene said, "All right; put it in and I will pay it."

134 J. M. JAMISON, called for the plaintiffs, being duly sworn, testified as follows:

Direct examination:

I was present at Judge Street's court in Phœnix when Mr. Chalmers submitted the case of the Cobre Grande Copper Company against Greene and others. It was Saturday, the 13th of April, 1901—the law day.

Plaintiff's counsel offers in evidence copy resolution of meeting of board of directors of the Cobre Grande Copper Company, as follows:

PHŒNIX, ARIZONA, April 3, 1901.

Directors' meeting of the Cobre Grande Copper Company, pursuant to call of E. B. Gage, president, issued on the 27th day of March, 1901.

PHŒNIX, ARIZONA, April 3, 1901.

Present: E. B. Gage, president and director. W. M. Adamson, director. Con O'Keefe, director. J. Henry Wood, secretary and director. There were also present L. H. Chalmers and J. C. Herndon, attorneys for the Cobre Grande Copper Company. The meeting was called to order by E. B. Gage, president. Upon motion of Mr. Adamson, seconded by Mr. O'Keefe, the following resolution was adopted, namely:

Resolved, That William C. Greene be appointed agent of the Cobre Grande Copper Company for it and in its name, to transact any and all business of and on behalf of this company, and particularly to control and direct every and all suits pending in the State of New York in which this company is a party; to discharge and employ attorneys; to receive and receipt for every and all assets of the company; and to discharge, adjust and satisfy every and all claim or claims against it; to begin and prosecute or dismiss any suit
135 or proceeding he may deem necessary for the benefit of said company."

Plaintiffs' counsel reads from the clerk's minutes showing that the complaint in the present action was filed on January 3, 1901, at 9 a. m.; also showing the granting of an injunction herein on April 11, 1901, in the present action; also record showing the service of the injunction as follows:

"Service of the within, together with copy of the affidavit of plaintiff and Grant R. Bennett, copy of complaint and exhibits, acknowledged April 11th, 1901. Herndon & Norris, attorneys for the Cobre Grande Copper Company, E. B. Gage, W. M. Adamson, Con|O'Keefe and the Phœnix National Bank. Robert E. Morrison, attorney for George Mitchell."

Also return attached to said writ of injunction, by Frank E. Murphy, sheriff, by E. Drachman, deputy, showing the service on the 13th of April, 1901, on Wm. C. Greene, the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company, and service on J. H. Martin, member of the firm of Barnes & Martin, on April 13, 1901.

Also, return of sheriff of service of writ of injunction and papers attached, as follows:

"Office of the Sheriff of Pima County, Arizona.

TUCSON, ARIZONA, April —, 1901.

I hereby ceritify that I received the within writ of injunction and order to show cause why a receiver should not be appointed, etc., on the 13th day of April, 1901, and personally served the same on the 13th day of April, 1901, on William C. Greene, Cananea Consolidated Copper Company, Greene Consolidated Copper Com-
136 pany, three of the defendants named in said writ and order, by delivering to J. H. Martin, at Tucson, Pima county, Arizona, the said J. H. Martin being a member of the firm of Barnes & Martin, attorneys at law, attorneys of record for said three defendants, a duplicate of said original writ of injunction and order, annexed to a true copy of the affidavits of Axel W. Hallenborg and Grant R. Bennett, together with a true copy of the complaint in said action and the other exhibits, true copies thereof attached to said affidavits. Dated this 13th day of April, 1901.

E. DRACHMAN, Deputy.
FRANK E. MURPHY, Sheriff."

"Office of the Sheriff of Maricopa County, Arizona.

PHŒNIX, ARIZONA, April —, 1900.

I hereby certify that I received the within and attached writ of injunction and order to show cause why a receiver should not be appointed, etc., on the 12th day of April, 1901, and personally served the same on the 15th day of April, 1901, on J. Henry Wood, and on the 12th day of April, 1901, on The Phœnix National Bank, being two of the defendants named in the said writ, by delivering to J. Henry Wood personally, in said county, and to C. J. Hall, secretary and cashier of the defendant bank, in said county, a copy of said writ, together with a copy of the said order to show cause, annexed to a true copy of the affidavits of Axel W. Hallenborg and Grant R. Bennett, together with a true copy of the complaint in the within named action and the other exhibits, true copies thereof, attached to said affidavits.

Dated this — day of April, 1901.

W. E. WILLIAMS, Deputy.
S. S. STOUT, Sheriff."

137 Writ of injunction dated April 11, 1901, read in evidence. Pl'ffs' Ex. Hallenborg Injunction.

Plaintiffs' counsel reads from the files of the court in the present case, date of answer of Greene Consolidated Copper Company, Cananea Consolidated Copper Company, February 22, 1901, and date of answer of William C. Greene, February 9, 1901.

The foregoing contains all the testimony and evidence given in this case.

Testimony closed.

138 PLAINTIFFS' EXHIBIT STOCK CERTIFICATES.

Consists of certificates of the capital stock of the Cobre Grande Copper Company, No. 811, 8237 9/10 shares; No. 817, 80 shares; No. 820, 200 shares; No. 822, 100 shares; dated respectively, November 3, November 16th, November 20th, and November 30th, 1900, stating that Axel W. Hallenborg is the owner of those shares, fully paid and non-assessable, transferable only on the company's books in person or by lawful authority, upon the surrender of the certificate each indorsed in blank Axel W. Hallenborg by Grant R. Bennett, attorney in law and fact.

PLAINTIFFS' EXHIBIT 1.

Minutes of the Meeting of Stockholders of the Cobre Grande Copp-r Company, Held Tuesday, Nov. 14, 1899.

These minutes include the call for the meeting; the formal proceedings of the organization of the meeting; names of stockholders and proxies present, being 31 stockholders, representing 113,340

shares of stock. Election of directors, Gage, Adamson, O'Keefe, Melgarejo and Wood. Also the following:

"Upon motion the secretary was excused from making his detailed annual report of the operations of the company, for the reason that the books of accounts of the company are now in the hands of W. C. Greene and associates, and that they have refused to allow the company's bookkeeper to make a statement of the accounts of the company to the secretary. The secretary then verbally reported that at the time he was dispossessed of said books; that the company was out of debt for the first time and operating the mine successfully; that if they had been unmolested in the management of the mines and plant that they would at this time have had
139 a sufficient surplus on hand to meet all obligations of any kind maturing or to mature as they became due.

The following resolution offered by Mr. Adamson and seconded by Mr. Dort was unanimously adopted and ordered spread upon the minutes of this meeting:

Whereas, W. C. Greene, by fraudulent *mis*representations has obtained the possession and control of the property of this company in Sonora, Mexico, while the same was in successful operation by the company and thereby has prevented this company from operating its mining property, and from controlling any of its property in Sonora;

Therefore be it resolved by the stockholders of the Cobre Grande Copper Company That the actions of said Greene have greatly damaged this company, depreciated its property and injured its credit.

That the directors of this company be and they are hereby authorized and directed to institute all necessary legal proceedings to recover and retain the possession of said property before the authorities, judicial or otherwise, of Sonora, Mexico, in which State said property is situated, and before any other authorities of the whole Mexican Republic when necessary; and further to institute and prosecute such legal proceedings either in the United States of America or in the Republic of Mexico, against said Greene and those acting with him as may be necessary to compel an accounting to this company for all money and property so taken; and to recover from said Greene and those acting with him all damages sustained on account of said actions in the premises."

Also, meeting of board of directors of the Cobre Grande Copper Company, November 15, 1899, showing election of E. B. Gage as president, A. Melgarejo vice-president; J. Henry Wood, secretary and treasurer.

140 PLAINTIFFS' EXHIBIT NOTES.

Note of Cobre Grande Copper Company for $12,000 dated January 19, 1900, due April 15, 1900, to Benjamin Orne, indorsed and assigned to A. W. Hallenborg.

Note of Cobre Grande Copper Company for $14,175, dated March

6, 1900, due May 15, 1900, to Benjamin Orne, indorsed and assigned to A. W. Hallenborg.

Note of Cobre Grande Copper Company for $6,000, dated May 1, 1900, due August 1, 1900, payable to A. W. Hallenborg.

Note of Cobre Grande Copper Company for $4,000, dated May 23, 1900, due August 24, 1900, payable to A. W. Hallenborg.

Note of Cobre Grande Copper Company for $1,905.25, dated June 29, 1900, due October 1, 1900, payable to A. W. Hallenborg.

Note of Cobre Grande Copper Company for $1,000, dated August 18, 1900, due November 18, 1900, payable to A. W. Hallenborg.

Note of Cobre Grande Copper Company for $4,283, dated March 15, 1900, due June 1, 1900, payable to A. W. Hallenborg.

Note of Cobre Grande Copper Company for $7,042, dated May 1, 1900, due August 1, 1900, payable to Benjamin Orne, indorsed and assigned to A. W. Hallenborg.

All these notes executed by Cobre Grande Copper Company, by E. B. Gage, president, and J. Henry Wood secretary and treasurer.

141 PLAINTIFFS' EXHIBIT 2.

Summons, Pleadings, and Preliminary Injunction in the Action of the Cobre Grande Copper Co., Plaintiff, *v.* William C. Greene *et al.*, Defendants.

Summons in the district court of the third judicial district of the Territory of Arizona, in and for Maricopa county; The Cobre Grande Copper Company, plaintiff, *v.* William C. Greene, George Mitchell and The Phœnix National Bank of Phœnix, A. T., defendants. Dated June 27, 1900. Signed and sealed, W. C. Foster, clerk of said district court.

Return by the sheriff of service on George Mitchell attached, dated June 27, 1900. Indorsed filed June 27, 1900, W. C. Foster, clerk, Chalmers, Herndon & Norris, and Baker & Bennett, attorneys for plaintiff.

Same title. Injunction order and writ of injunction addressed to William C. Greene, George Mitchell and The Phœnix National Bank of Phœnix, A. T. Recites, complaint filed by the Cobre Grande Copper Company, above named plaintiff praying for an injunction and enjoins defendants from receiving from the Phœnix national bank and the said Phœnix national bank from delivering and surrendering to the defendants Greene and Mitchell, or either of them, certain papers in escrow in possession of the said bank namely: a certain deed executed by the said William C. Greene to said George Mitchell, conveying to said Mitchell the following mines claims, viz: The Mina Grande No. 370; the Cobra Grande No. 2, registered No. 371; the El Ronquillo No. 2, registered No. 373; the El Chivatera No. 2, registered 374; the Pavo Real No. 375; the Los Suerta No. 376; the La Veta Grande No. 379; the Perdida No.

377, and the Esperenza No. 6117, which said deed is dated November 26, 1898.

Also a certain deed executed by said William C. Greene to the said George Mitchell, purported to convey to the said
142 George Mitchell, the following described patent mining claims: San Ignacio, patent No. 2401; La Chivetera, patent No. 2402; Cobre Grande, patent No. 2403; El Ronquillo, 2649, which said deed is dated November 26, 1898, together with all contracts, agreement and memorandum and any and either of the same executed by the said William C. Greene, George Mitchell and the Cobre Grande Copper Company or either of them connected with or in any manner referring to said deeds or either of them or the property therein described and now in the hands of the said Phœnix national bank, in escrow, or otherwise, on November 28th, 1898.

Order of injunction signed, Webster Street, judge, November 25th, 1899. Writ of injunction signed and sealed, W. C. Foster, clerk of said district court, dated June 27, 1900. Return of D. L. Murray, sheriff, dated June 27, 1900, annexed, showing service thereof on George Mitchell. Indorsed same as writ.

Original complaint in same action, verified November 25, 1899. This is not copied in full because the complaint was amended.

Amended complaint in the same action is as follows:

Comes now the plaintiff in the above entitled action and for its complaint alleges:

I.

That the plaintiff Cobre Grande Copper Company, hereinafter called the company, is a corporation created and existing under the laws of the Territory of Arizona, and having its principal office in Phœnix, in said county of Maricopa, and is carrying on mining operations in the State of Sonora, Republic of Mexico.

That the defendant William C. Greene is a resident of Cochise county, Arizona.

That the defendant George Mitchell is a resident of Maricopa county, Arizona.

And that the defendant, The Phœnix National Bank, is a corporation organized under the laws of the Territory of Arizona
143 and the national bank act of the United States, and having its principal place of business in Phœnix, Maricopa county, Arizona.

II.

That in the year 1898, and prior thereto, the defendant Greene was the owner of and had secured options for the purchase of certain mining property in the State of Sonora, Republic of Mexico, and which said mining properties are described as follows:

The Mina Grande No. 370, Cobre Grande No. 2, registered No. 371; the El Ronquillo No. 2, registered No. 373; the El Chivatera No. 2,

registered No. 374; the Pavo Real No. 375; the Suerta No. 376; the La Veta Grande No. 379; the Perdida No. 377; the Esperanza No. 6117; San Ignacio, patent No. 2041; La Chivetera, patent No. 2402; Cobre Grande, patent No. 2403; El Ronquillo, 2649.

That on the 26th day of November, 1898, the said Greene made and executed for value, an agreement in writing to sell said properties to the defendant George Mitchell, a copy of which said agreement is hereto attached marked "Exhibit A" and made a part hereof, and which said agreement was then placed in the hands of the said Phœnix national bank in escrow, with the deeds and agreements hereinafter mentioned, and with the intent and for the purpose of carrying said agreement into effect, executed deeds of conveyance to the said properties to the said George Mitchell, and placed them in escrow with the Phœnix National Bank of Phœnix, A. T., to be delivered to the said Mitchell upon certain payments, specifically set out in certain escrow agreements, which said agreements were also placed in the hands of the said Phœnix national bank, and which payments cover a period of several years, a copy of which deeds and escrow agreements are hereto attached, marked Exhibits B–1 and B–2 respectively, and are a part hereof.

That the said agreements were entered into and the said
144 deeds executed for the purpose and intent that the said Mitchell should form and organize a corporation under the laws of the Territory of Arizona, for the purpose of taking title to and developing and operating the said mines and mining claims. That afterwards the defendant Mitchell, with the knowledge and consent and assistance of the defendant Greene, formed, created and organized, under the laws of the Territory of Arizona, the Cobre Grande Copper Company, the plaintiff herein and that the defendant William C. Greene became and was one of the incorporators of said company and a member of its first board of directors, and has been continuously since the organization of said company, a stockholder and director therein until the 14th day of November, 1899, on which date the annual meeting of stockholders for the election of directors was held in the office of said company at Phœnix, A. T., and a new board of directors was elected by the stockholders of said company.

That upon the organization of said company the said George Mitchell, with the consent of the said William C. Greene, transferred, assigned and sold to the said Cobre Grande Copper Company the said contract between the said Greene and Mitchell for the purchase by said Mitchell of the said mining claims, together with all his interest in the said mining claims and the appurtenances thereto and his option to purchase the same.

That thereupon by and with the consent and assistance of the said William C. Greene, the said Mitchell sold to divers and numerous persons, within and without the Territory of Arizona, shares of the capital stock of said company, for and on behalf of said company, and received therefrom large sums of money on account and

behalf of said company, and that the said sales of stock were made upon the faith and credit of the assignment and sale of said contract between said Greene and Mitchell and of the said mining claims and the options to purchase the same. And that thereafter the said company entered into and upon said properties, and with the moneys derived from the sale of its capital stock aforesaid, commenced working, operating and developing said mining properties, and so continued in the possession, operation and development thereof until the wrongful acts of the defendants Mitchell and Greene hereinafter set forth.

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III.

That with the money derived from the sale of the capital stock of said company and raised by said company by the pledging of its credit, the said Cobre Grande Copper Company has greatly improved, developed and equipped the said mining properties, and under the management and direction of said company and its operations, the said mining properties have developed great value, richness and productiveness. That the said company have erected extensive and expensive machinery upon said claims for the purpose of operating the same, and have accumulated large stores of supplies and material used in the working and operation of said mine, and also large quantities of bullion, matte, concentrates and other products of said mines, and has placed said mines and mining properties upon a substantial, working and prospectively profitable basis.

That at the time of the execution of the contract between the said William C. Greene and George Mitchell and at the time of the organization of the Cobre Grande Copper Company and the assignment of the said contract by the said George Mitchell to the said Cobre Grand Copper Company, it was contemplated and intended by all the parties to said contracts and the assignment thereof, that the said George Mitchell and his assigns should, until default by him or them of some of the agreements in said contracts contained, or his or their part to be kept or performed, have the sole and exclusive possession of said mines and mining property, and the sole and exclusive rights to extract ores therefrom, and it was further contemplated, expected and intended by all the parties to said agreement that the sum of thirty-seven thousand five hundred dollars ($37,500) to be paid by said George Mitchell and his assigns to said W. C. Greene on November 26th, 1898, according to the terms of said contract would largely be made out of the proceeds of the ores, matte and bullion produced from said mines.

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That the said W. C. Greene, at the time of the execution of the said contracts, "Exhibits A, B–1 and B–2," knew that the Cobre Grande Copper Company then about to be organized by said Mitchell and Greene for the purpose of taking an assignment from said Mitchell of said contract and of executing the same, could and would have no property except the said contract and the right to the pos-

session and operation of the said mines thereunder, and that it was upon the faith and credit of said contracts and the right of the plaintiff company thereunder to the exclusive possession and operation of said mines, that the said company, with the knowledge, counsel and assistance of said Greene and Mitchell who from its organization to October 14th, 1899, were directors of said company, was enabled to sell and dispose of large amounts of the stock of the plaintiff company to its present stockholders, and with which money derived from the sale of its said stock the plaintiff company erected a smelter upon said mining property, purchased supplies with which to operate the same, and produced the matte and bullion from said mines thereafter seized by said Greene and appropriated to his own use as hereinafter set forth.

That to that end and purpose the said Cobre Grande Copper Company had, prior to the times hereinafter mentioned, built, erected and placed upon said mines and mining claims a smelter for the purpose of reducing and treating the ores taken from said mines, and extracting the bullion therefrom, at a cost to the plaintiff company exceeding the sum of sixty thousand dollars ($60,000) and was operating the said mines and smelter and was producing thereby from said mines large quantities of said matte and bullion.

IV.

And plaintiff further alleges that thereafter, to wit, on the
147 23rd day of September, 1899, and while the said William C. Greene was a director of the plaintiff company, the said William C. Greene conspiring and confederating with the defendant George Mitchell and one George A. Treadwell, both of whom were also directors of the plaintiff company, for the purpose and with the intent and object of letting, hindering and embarrassing the plaintiff company in its operation of said mining properties, and with the purpose and intent to prevent the plaintiff company from making the first payment, to wit, the sum of thirty-seven thousand five hundred dollars ($37,500) upon said mining property, due on November 26th, 1899, according to the terms of said mining contract "A" and escrow agreements "B–1 and B–2," and of claiming a forfeiture of all the rights of the plaintiff company by virtue of said contracts "A, B–1 and B–2" and the reversion of all said mining properties to said William C. Greene according to the terms of said contract, undertook, attempted and pretended to hold a meeting of the directors of the plaintiff company at Bisbee, Arizona, at which meeting there were present of the directors of this company, only the said William C. Greene, George Mitchell and George A. Treadwell, and undertook, attempted and pretended to remove one J. H. Costello, who was then the president of this company, and one J. Henry Wood, who was then the secretary of this company, from their respective offices and to elect the said William C. Greene to be the president of this company, and one Scott White to be the secretary thereof.

V.

That thereupon the said William C. Greene and Scott White pretended and held themselves out to be the president and secretary of the plaintiff company and notified all parties and persons with whom the said company had dealings, that the said Costello and the said Wood were no longer officers of said company, and warning all persons dealing with said company not to deal with the said Costello and the said Wood, as officers of said company, but
148 with the said William C. Greene and Scott White as the officers of said company, and demanded and succeeded in obtaining the mail addressed to the said company, and demanded and succeeded in obtaining returns from ore, bullion and concentrates theretofore shipped by said company to various smelters and firms throughout the United States, and endeavored and attempted to usurp all the functions of the said offices of president and secretary respectively of this company. That thereupon the said defendants Greene and Mitchell proceeded to the mines of this company and demanded possession of the same as president and secretary of this company.

VI.

That thereafter, to wit, on the 30th day of September, 1899, the said William C. Greene, while still a director of this company and assuming to be its president, for the purpose and with the intent hereinbefore stated, organized a corporation in the State of Sonora, Republic of Mexico, denominated the Cananea Consolidated Copper Company, and thereafter, to wit: On the 11th day of October, 1899, the said William C. Greene, for the purpose and intent aforesaid, attempted, pretended and assumed to convey to the said Cananea Consolidated Copper Company, all of the mining properties hereinbefore mentioned and all the options to purchase the same. That the said conveyances were made by the said William C. Greene under a claim then falsely asserted by him that the said George Mitchell and his assignee, this plaintiff, had failed to perform the conditions of the contract hereinbefore mentioned, being Exhibit A hereof, and that thereby the said mining claims, property and options to purchase the same had become forfeited by the said Mitchell and his assigns, this company, and had reverted to said William C. Greene. That thereby the said William C. Greene, acting in conjunction with the said George Mitchell, and while both the said William C. Greene and George Mitchell were still directors of the plaintiff company and
149 the said William C. Greene was assuming and acting as the president thereof, demanded and by threats, intimidation and false representations hereinbefore mentioned, succeeded in obtaining possession of all the said mines and mining claims and properties, together with all the appurtenances, improvements and appliances placed thereon by this company, and also all of the supplies

purchased and provided by this company for use in the working and operation of said mining property, and which said supplies alone were of great value, to wit: the sum of twenty-five thousand dollars ($25,000). That the said William C. Greene, by the means aforesaid, succeeded in obtaining the possession of the product of said mines and of the returns from the various smelters to whom the products of said mines had been shipped, amounting, as this plaintiff verily believes, to the sum of fifty thousand dollars ($50,000), and has conveyed, transferred and delivered and turned over the whole of the said mines and mining claims, property supplies, proceeds to the Cananea Consolidated Copper Company, so organized by the said William C. Greene as aforesaid, and of which last mentioned company the said William C. Greene was the organizer, is the general manager and is practically the entire owner, and ever since the said Greene and said Cananea Consolidated Copper Company have been operating said mines and mining claims for their own benefit and to the exclusion of this company.

That all of the said acts and doings of the said William C. Greene have been for the purpose and with the intent of defrauding this company out of its said property, and particularly for the purpose and intent of hindering, delaying and preventing this company from making payment of the sum of thirty-seven thousand five hundred dollars ($37,500) upon the said mining properties, due November 26th, 1899, according to the terms of the agreement Exhibit A and the escrow agreements Exhibit B–1 and B–2.

150 VII.

Plaintiff further alleges that the wrongful acts of the said Greene and Mitchell, by seizing and depriving the plaintiff of the possession of its property, supplies and returns from the said matte and bullion, produced and shipped by plaintiff, have injured, impaired and destroyed the credit of the plaintiff company to such an extent as to make it impossible for plaintiff to borrow or otherwise procure the money to make the said payment of thirty-seven thousand five hundred dollars ($37,500) as aforesaid, which it would otherwise have been readily able to do and would have done.

VIII.

Plaintiff further alleges that this plaintiff, as assignee of the said George Mitchell, has faithfully kept and performed all the terms of the agreements "Exhibit A" and of the escrow agreements "Exhibits B–1 and B–2," attached hereto, to the present time. That by reason of the fraudulent acts of the said William C. Greene and the said George Mitchell hereinbefore mentioned, this plaintiff is now unable, and on the 26th day of November, 1899, will be unable to pay the said sum of thirty-seven thousand five hundred dollars ($37,500) provided to be paid by said contracts "Exhibits A, B–1, B–2," that plaintiff would have been able to and would have made said pay-

ment on November 26th, 1899, except for the wrongful acts of the defendant William C. Greene aforesaid, and which said wrongful acts were all done and performed by the said Greene for the purpose of preventing this plaintiff from making such payment on said date so that the said Greene might claim a forfeiture of all plaintiff's rights under said contracts and agreements.

IX.

Plaintiff further alleges that it is now proceeding through
151 the court of the State of Sonora in the Republic of Mexico, where said mining properties are situated, to recover the possession of the said mines, mining claims and property from the defendant William C. Greene and the said Cananea Consolidated Copper Company; that plaintiff is advised that it will regain possession of said mines, mining claims, appurtenances, property and supplies, so far as the same have not been squandered by the defendant Greene and appropriated for his own use, within a reasonable time and that within a reasonable time thereafter this plaintiff will be able to and will make the said payment of thirty-seven thousand five hundred dollars ($37,500) due according to the terms of said contracts "A and B–1 and B–2" on November 26th, 1899.

X.

Plaintiff further alleges that the defendant William C. Greene and George Mitchell have not sufficient property to respond to plaintiff in damages for the wrongful acts above set forth; that the plaintiff has no adequate remedy at law and is without remedy except in a court of equity.

XI.

That the defendants William C. Greene and George Mitchell threaten, intend to and will, on November 27th, 1899, unless restrained by this honorable court, demand from the defendant The Phœnix National Bank in case the said sum of thirty-seven thousand five hundred dollars ($37,500) is not paid on or before the said 26th day of November, 1899, the said contract "Exhibit A" and the said escrow agreements and deeds thereto attached, "Exhibits B–1 and B–2," together with all contracts, agreements and memorandums executed by the said William C. Greene, George Mitchell and the Cobre Grande Copper Company, or either of them, connected with and referring to said deeds and contracts, or either of them, or the property therein described; a copy of all of which
152 papers and documents is hereto attached marked "General Exhibit," and hereby made a part of this complaint, and that unless restrained by this court, the defendant, The Phœnix National Bank, will in default of such payment and upon such demand, deliver and surrender the said agreements, deeds, contracts and papers to the said William C. Greene and George Mitchell.

Wherefore plaintiff prays that pending this action the defendants William C. Greene and George Mitchell be restrained by this court from demanding or receiving from the Phœnix National Bank, and the said Phœnix National Bank be restrained from delivering or surrendering to the said William C. Greene and George Mitchell or either of them and from parting with the possession of any or either of the following described papers and documents, now in the possession of the said Phœnix National Bank, viz:

A certain deed executed by the said William C. Greene to said George Mitchell, conveying to said Mitchell the following mining claims, viz: The Mina Grande No. 370; the Cobre Grande No. 2, registered No. 371; the El Ronquillo No. 2, registered No. 373; the Chivatera No. 3, registered No. 374; the Pavo Real No. 375; the Los Suerta No. 376; the La Veta Grande No. 2, 379; the La Perdida No. 377, and the La Esperenza No. 6117, which said deed is dated November 26th, 1898.

Also a certain deed executed by said William C. Greene to the said George Mitchell, purporting to convey to the said George Mitchell the following described patent mining claims: San Ignacio, patent No. 2401; La Chivatera, patent No. 2402; Cobre Grande patent No. 2403; El Ronquillo, 2649, which said deed is dated November 26th, 1898, together with all contracts, agreements and memorandams and any and either of the same executed by the said William C. Greene, George Mitchell and the Cobre
153 Grande Copper Company, or either of them, connected with or in any manner referring to said deeds or either of them, or the property therein described, and now in the hands of the said Phœnix National Bank, in escrow or otherwise, until the further order of this court.

That the plaintiff may be permitted to make the said payments of thirty-seven thousand five hundred dollars ($37,500) within a reasonable time after it shall be restored to the possession of the said mines and mining claims and property, of which possession it has been so wrongfully deprived by the said defendants Greene and Mitchell, and who together with the said Cananea Consolidated Copper Company, the creature of the said William C. Greene as aforesaid, now wrongfully withhold the possession of said property from the plaintiff.

That the said William C. Greene may be required to account to this plaintiff for all the proceeds of the product of said mines and mining claims, produced by this company before the taking possession of said mines and mining claims by said Greene, together with all supplies, material for the working and operation of said mining property, taken and appropriated by said Greene as aforesaid, and also the product of said mines since the possession thereof has been taken by the said Greene as aforesaid, and that the said Greene may be adjudged to pay the amount found due to plaintiff upon such accounting to this plaintiff.

That the plaintiff may have other and further proper relief.

CHALMERS & JAMISON,
HERNDON & NORRIS,
BAKER & BENNETT,
Attorneys for Plaintiff.

Complaint verified July 21, 1900, by L. H. Chalmers, one of the attorneys for the plaintiff.

154 The following papers were attached to the original and amended complaints:

"PHŒNIX, ARIZONA, June 28, 1899.

Received from the Cobre Grande Copper Company, J. D. Dort, secretary, 199,995 shares of the capital stock of said company in full for certain conveyances made to the said company on May 26th, 1899; said conveyance being duly filed in the office of the said company a record of the transaction shown in the said company's record book under date of May 26th, 1898.

GEO. MITCHELL."

There is also attached, copy assignment George Mitchell to the Cobre Grande Copper Company, in consideration of 199,995 shares of stock, and of all his right, title and interest to the escrow agreement entered into between Mitchell and Greene, dated November 28th, 1898, covering the mining property in the Cananea mountains, district of Arispe, Sonora, in question.

Also, agreement between the same parties.

Also, all the improvements and property, on, at or near the said mines, with other property therein mentioned.

Also, agreement dated November 26th, 1898, between W. C. Greene and George Mitchell, reciting escrow agreements 1 & 2, executed by Greene to Mitchell on the same day, covering certain mines and the deposit thereof with the Phœnix National Bank, and that Mitchell is to be put into possession of the property and that in consideration of $12,500 cash already paid to Greene by Mitchell and $37,500 to be paid on or before November 26, 1899, $100,000 to be paid on November 26, 1900, and $100,000 to be paid on November 26th, 1901, in all $250,000, Greene agrees to warrant and defend the title to said properties and Mitchell is granted the right and permission to enter upon and take possession of the same and every part thereof, and to work and operate the same, and to work and extract ores therefrom, and Mitchell further agrees to erect a

155 water jacket, smelting furnace and appliances within six months, and to pay Greene 50% of the net proceed of the ores and bullion. In case either party fails to keep the provisions of the contract, the other party may elect to consider the same as a forfeiture of the terms and conditions thereof. In case Mitchell fails to make the payments then the escrow agreements together with this contract shall be rendered null and void, and all the property therein described shall revert to Greene, together with the plant thereon.

Also, warranty deed dated November 26, 1898, Greene to Mitchell, consideration $230,000 of the eight mining claims situated in the municipality of Fronteras, district of Arispe, Sonora, Mexico, namely: Mina Grande No. 370; Cobre Grande No. 371; El Ronquillo No. 373; La Chivatera No. 374; Pave Real No. 375; La Veta Grande No. 379; La Perdida No. 377, and La Esperenza No. 6117. Duly acknowledged same date.

Also, warranty deed, William C. Greene to George Mitchell, consideration $20,000, of four mining claims in Fronteras, Sonora, namely: San Ignacio No. 2401; La Chivatera No. 2402; Cobre Grande No. 2403 and Ronquillo No. 2649. Duly acknowledged same date.

Agreement dated November 26th, 1898, between Greene and Mitchell. Refers to deed from Greene to Mitchell of said eight mines and that it is placed in escrow with the Phœnix National Bank to be delivered to Mitchell if all the payments above referred to are made as provided, otherwise to be returned to Greene.

Agreement dated November 26, 1898, between Greene and Mitchell, refers to deed from Greene to Mitchell for said four mines, and provides if Mitchell shall pay the sum of $20,000 on November 26th, 1899, then the Phœnix National Bank shall deliver the said deed to Mitchell, otherwise it shall be returned to Greene.

Agreement dated April 15, 1899, between Greene and
156 Mitchell. Recites deed of said twelve mines and deposit thereof in the Phœnix bank, and that Greene has a permit from the Mexican government allowing him to convey property within the frontier zone of twenty leagues, which said permission is necessary in order to enable foreigners to own real estate within the said frontier zone, and declaring that upon complying with the terms of the escrows, Greene shall continue to hold the property in trust for George Mitchell.

Agreement dated July 22, 1899, between William C. Greene and the Cobre Grande Copper Company. Refers to said twelve mines described in said deeds and escrow agreements and recites that the Cananea Copper Company entered into a contract to sell the same to him and that Greene contracted to sell the same to Mitchell; that Mitchell organized the Cobre Grande Copper Company, and that Greene has denounced and owns certain other mining claims adjoining said property, namely: La Bonita, El Pinito, El Campo, San Pedro, Las Chivas and El Rey, and that it is understood between Greene and Mitchell that these last six mines shall be conveyed by Greene to the Cobre Grande Copper Company, and agrees that Greene will if necessary cause a deed to be made by the Cananea Copper Company to Mitchell or to the Cobre Grande Copper Company direct, and that if any of the deeds executed by Greene to Mitchell be defective or insufficient, he will execute further assurances to the Cobre Grande Copper Company or the persons properly authorized, and that he will make a valid deed to the last six named mines to the Cobre Grande Copper Company, or to whomsoever it

authorizes to receive the same; provides also for further surveys, etc., and confirms the contract between Greene and Mitchell of the 26th of November, 1898, which has been assigned to the Cobre Grande Copper Company, and modifying the time of payment thereof so that $37,500 is to be paid November 26th, 1899, and the balance in instalments of $50,000 at intervals of one year. Said agreement further modifies the said contract with reference to the payment of the 50% net proceeds to Greene, with reference to the accounting therefor, and the manner and basis thereof.

157 Answer of William C. Greene, by Barnes & Martin and Norton Chase, his attorneys, in the same action. Verified June 25th, 1900.

Demurs to the complaint as insufficient, etc. Admits the execution of the written contracts and the entry of the Cobre Grande Copper Company upon the property in question and the operation thereof by the said company described in the complaint and claims a forfeiture in the payment of $37,500 due under the said contract. Said answer covers fifteen typewritten pages and contains many denials of matters alleged in the complaint and much affirmative matter set up as a defense.

Amended answer of defendant Greene, by Barnes & Martin and Norton Chase. Verified July 23, 1900; filed July 25, 1900.

Substantially repeats the allegations of the original answer.

Answer of defendant George Mitchell, by Robert E. Morrison, his attorney. Filed July 2, 1900.

Demurs to the complaint as insufficient and denies all the allegations thereof.

Supplemental answer of defendant Greene by Barnes & Martin and Norton Chase, his attorneys. Filed July 30, 1900.

Alleges the transfer of said property by him to the Cananea Consolidated Copper Company upon an agreement of said company to indemnify him against the claims of the Cobre Grande Copper Company.

Separate answer of George Mitchell, by Robert E. Morrison, his attorney, to the amended complaint. Verified October 22, 1900. Filed October 23, 1900.

Demurs thereto as insufficient and for other reasons. Denies many allegations in the complaint contained and sets up affirmative matter at considerable length and asks that complaint be dismissed and for costs.

158 PLAINTIFFS' EXHIBIT 3.

Agreement of December 12th, 1900.

This memorandum of agreement, made and entered into this 12th day of December, A. D. 1900, by and between William C. Greene, of Bisbee, Arizona, and the Greene Consolidated Copper Company by William C. Greene, its president, duly authorized to represent it in this behalf, parties of the first part, and E. B. Gage, of Prescott, Arizona, and the Cobre Grande Copper Company, a corporation by E. B. Gage, its president, parties of the second part, witnesseth:

That whereas, E. B. Gage, one of the parties of the second part, is the owner of 115,049 shares of the capital stock of the Cobre Grande Copper Company, a corporation organized under and by virtue of the laws of the Territory of Arizona, holding the same as trustee for certain stockholders of said Cobre Grande Copper Company, with power to dispose of the same and to act in their behalf, with the terms of which power first parties are familiar.

Now, the parties of the first part hereby agree to become the purchasers of the said shares of stock for and in consideration of two dollars and fifty cents ($2.50) per share and for the further considerations as hereinafter expressed. The said parties of the first part pay on the execution of this contract fifty cents per share for the said stock. The next instalment of one dollar per share shall be paid within thirty days from this date, provided that if the parties of the first part shall not get the proceeds of certain matte, now in litigation in the State of New York within the said thirty days then they shall have twenty (20) days more in which to pay said instalment of one dollar per share to the said E. B. Gage. The last instalment of one dollar per share is to be paid by the parties of the first part to the said E. B. Gage of the second part on or before sixty days after the said payment of the said second instalment aforesaid.

159 The said parties of the first part shall on or before the time of the payment of the last installment as aforesaid, pay or cause to be paid to the said E. B. Gage of the second part, twenty-five thousand dollars ($25,000) in cash in addition to the two dollars and fifty cents ($2.50) per share.

In addition to the foregoing payment at the same time last aforesaid, the said parties of the first part shall pay or cause to be paid to the said E. B. Gage of the second part, thirty thousand dollars ($30,000) in cash.

And in addition to the foregoing payments the parties of the first part shall deliver to the said E. B. Gage of the second part, at the last time aforesaid, properly transferred, three thousand (3,000) shares of the capital stock of the Greene Consolidated Copper Company, or the parties of the first part shall have the option in lieu of the delivery of said three thousand (3,000) shares of stock to pay

or cause to be paid at the same time to E. B. Gage of the second part thirty thousand dollars ($30,000) in cash.

The said E. B. Gage of the second part shall have the privilege in lieu of the said two dollars and fifty cents ($2.50) per share for the said shares of stock of the Cobre Grande Copper Company, of exchanging all or any part of said shares with the parties of the first part for stock of the Greene Consolidated Copper Company upon the terms of four (4) shares of Cobre Grande Copper Company stock for one share of Greene Consolidated Copper Company stock, the said option to be exercised at any time before the second payment as aforesaid, and in case of said exchange of stock the amount already paid thereon shall be refunded.

The said parties of the first part in addition to the foregoing, hereby agree at the time of the last payment aforesaid, to deliver to E. B. Gage of the second part, duly transferred, five thousand (5,000) shares of stock of the said Greene Consolidated Copper Company for his own use and benefit, and also five thousand (5,000) shares of said stock for the use and benefit of L. H. Chalmers, Baker & Bennett and Herndon & Norris, attorneys-at-law in the Territory of Arizona.

160 It is also agreed by the Cobre Grande Copper Company that a certain promissory note now in the hands — P. Sandoval & Company, given by J. H. Costello to the Cobre Grande Copper Company, for the sum of twenty-three thousand dollars (23,000) shall be by the said Cobre Grande Copper Company surrendered to said J. H. Costello.

It is also agree that all suits to which the Cobre Grande Copper Company is a party, now pending in the State of New York, shall be dismissed, each party paying his own costs, and all bonds given in said suits of any kind and character shall be discharged and the sureties thereon relieved from liability.

It is further agreed that the cause now pending in Cochise county, Arizona, brought by Isabella Chace and others against the Cobre Grande Copper Company shall be dismissed on the same terms.

It is further agreed that a suit in El Paso, Texas, now pending on appeal to the supreme court of the State of Texas, shall be disposed of as follows: The appeal perfected by the said Cobre Grande Copper Company shall be dismissed and the suit in the district court also shall be dismissed upon the terms that each party shall pay his own costs.

It is also agreed that the two suits in the district court of the county of Maricopa, in the Territory of Arizona, which have been submitted to the court for decision, that the order of submission shall, by consent, be set aside, and when final payment above provided for shall have been made, it is agreed that those suits shall be dismissed upon the same terms.

It is also agreed that any stockholders who are represented by the said E. B. Gage as owners of the said 115,049 shares of Cobre Grande Copper Company stock may withdraw their stock from this agree-

ment, if they wish to do so, provided that the said E. B. Gage shall be required to transfer at least 51,000 shares hereunder.

It is further agreed that the parties of the second part will do all things in their power to accomplish the result that the matte, or proceeds thereof, now in litigation in New York, shall be as
161 quickly as possible turned over and delivered to the parties of the first part, whether the same be now in the shape of matte or in money, the proceeds of the matte.

It is further agreed that all suits now pending in the State of New York between J. H. Costello and William C. Greene, or the Greene Consolidated Copper Company, shall also be dismissed, each party paying his own costs.

It is further agreed that if the first parties fail to make any of the payments above provided, at the times above named, that the amount theretofore paid by them shall be and continue the absolute property of E. B. Gage of the second part and first parties shall have no right to recover the same or any part thereof, and said Gage shall distribute the money paid him thereunder to the parties entitled thereto as the same shall be paid to him.

It is further agreed that the present directors of the Cobre Grande Copper Company, to wit: E. B. Gage, W. M. Adamson, J. H. Costello, J. Henry Wood and Con O'Keefe shall file with this contract their written resignation as directors and officers of said Cobre Grande Copper Company, and if this contract is carried out on the part of first parties, then said resignations shall remain in full force and effect, otherwise they shall be withdrawn.

It is further agreed that in order to carry out this contract, the said 115,049 shares of Cobre Grande Copper stock, now owned and held by said E. B. Gage of said second part shall be placed in escrow with the Phœnix national bank at Phœnix, Arizona; and said bank shall act as the escrow agent of the parties hereto, and upon the parties of the first part fully complying with the terms of this contract on their part said bank is hereby authorized and directed to deliver all of said stock to the said parties of the first part, but should the said parties of the first part fail, neglect or refuse to make any of the payments herein provided at the times or time hereinbefore specified, or shall fail, neglect, or refuse to carry out any of the terms of this contract, then the said Phœnix national
162 bank is hereby authorized and directed to return this contract with the stock and all papers placed in escrow herewith to the said E. B. Gage, trustee. Time is made the essence of this contract.

This contract shall be binding upon the parties hereto, their heirs, successors and assigns.

It is understood that certain clause hereinabove written, providing for the dismissal of suits in New York between J. H. Costello and W. C. Greene and the Greene Consolidated Copper Company, shall cover all suits to which they are parties and arising out of Cobre Grande matters.

In witness whereof, the parties have hereto set their hands and seals and caused these presents to be signed the day and year above written.

W. C. GREENE.
GREENE CONSOLIDATED COPPER CO.,
By W. C. GREENE, Pres.
E. B. GAGE, Trustee.
THE COBRE GRANDE COPPER CO.,
By E. B. GAGE, Pres.

I hereby ratify the foregoing contract, in so far as the same applies to me.

J. H. COSTELLO.

PLAINTIFFS' EXHIBIT 4.

This supplemental agreement made this 14th day of December, A. D. 1900, by and between William C. Greene of Bisbee, Arizona, and the Greene Consolidated Copper Company, by William C. Greene, its president, duly authorized to represent it in this behalf, parties of the first part, and E. B. Gage of Prescott, Arizona, and the Cobre Grande Copper Company, a corporation, by E. B. Gage, its president, parties of the second part, witnesseth:

That whereas, on the 12th day of December, 1900, a contract was entered into by the parties hereto, which said contract has been ratified at a directors' meeting of the Cobre Grande Copper Company, and

163 Whereas, in said original contract it was provided that the second payment of one ($1) dollar per share for the stock of the Cobre Grande Copper Company should be paid in thirty (30) days from December 12, 1900, and further provided that in case certain suits now pending in New York were not dismissed, or the proceeds realized from certain matte in controversy in said suits, that said parties of the first part shall have twenty (20) days further time in which to make said payment, and

Whereas, difficulties have arisen about the dismissal of said New York suits and about realizing the matte of the proceeds thereof, to the said first parties;

Now, therefore, in consideration of the premises and of the sum of one ($1) dollar by each paid to the other party, the receipt of which is acknowledged, this supplemental agreement, witnesseth:

That if said suits are not dismissed and the proceeds of said matte not realized by the said first parties within the said period fixed in said original agreement for the second payment, then said first parties shall have twenty (20) days additional time in which to make said second payment, that is to say, seventy (70) days from the 12th day of December, 1900.

It is further agreed that that clause in the contract relative to the two suits now pending in the district court of the county of

Maricopa, Arizona, and which are now substituted to the court for decision, be modified by adding to said clause the following:

That if said contract is not carried out and said money paid according to the terms of said contract, that then said suits shall be resubmitted to the court for decision, without further testimony or argument.

Witness the hands and seals of the parties this the day and year first above written.

WILLIAM C. GREENE, [SEAL.]
GREENE CONSOLIDATED COPPER CO.,
By W. C. GREENE, Pres. [SEAL.]
E. B. GAGE, [SEAL.]
COBRE GRANDE COPPER CO.,
By E. B. GAGE, Pres. [SEAL.]

164 PLAINTIFFS' EXHIBIT "ARTICLES."

Articles of incorporation of the Cobre Grande Copper Company dated April 22, 1899; filed and recorded April 25, 1899, in recorder's office, Phœnix, Maricopa county, Arizona Territory, book 3, articles of incorporation. Executed by George Mitchell, George A. Treadwell, William C. Greene, J. Dallas Dort, and O. O. Saxhang. Principal place of business, Phœnix, Arizona. General nature of the business proposed to be transacted is mining, and as incidental thereto the corporation proposes to acquire by location, purchase or otherwise, mines of copper, gold, silver, lead, coal and mines of all other kinds and nature whatsoever; and to borrow, lease or sell the same: to erect and maintain mills, reduction works, concentrating works, and any and all kinds of mining and milling machinery. By said articles the corporation also proposes, by location, purchase and in any other lawful manner, to acquire real estate, lands and all other kinds of property, real, personal and mixed. To acquire and operate railways, etc., and to do all and every act necessary, incidental and convenient to the proper transaction of the business, for which it is organized, in Arizona or elsewhere. The duration of the corporation as stated, is twenty-five years. Its capital stock $500,000, divided into 200,000 shares of $2.50 each, to be paid in *in* full and non-assessable. The affairs of the corporation to be conducted by a board of five directors. The directors of the first year to be the persons named as incorporators. The officers to consist of a president, vice-president, treasurer and secretary chosen by the board of directors, and of such subordinate officers, agents, etc., as the board of directors may from time to time elect or appoint.

165 PLAINTIFF'S EXHIBIT 7.

12/17/1900.

A. W. Hallenborg, Esq., New York city, N. Y.

DEAR SIR: I hand you herewith my check No. 27 on the Phœnix national bank for $4,309.00, being payment of fifty cents per share on your Cobre Grande stock in my hands as trustee.

I made a contract with William C. Greene and the Greene Consolidated Copper Company to sell this stock at $2.50 a share. The first payment of fifty cents being paid cash down; the other two payments of $1.00 each are to be made in 70 and 130 days respectively from December 13th.

The contract provides that any stockholder who does not desire to make the sale upon said terms may withdraw his stock from the pool and option. If you do not desire to accept the terms as made by me you will return the check and I will forward your stock to you. If you do accept the check kindly sign and return to me the attached receipt.

Enc. 2*a*.

Yours truly,

(Signed) E. B. GAGE, Trustee.

PLAINTIFF'S EXHIBIT 8.

NEW YORK, December 24th, 1900.

E. B. Gage, Esq., c/o Phœnix national bank, Phœnix, Arizona.

DEAR SIR: I beg to acknowledge receipt of your letter of the 17th inst. dated at Prescott, Arizona, notifying me that you had made a contract with William C. Greene and the Greene Consolidated Copper Company to sell stock in your hands as trustee, at
166 $2.50 per share, and enclosing me a check by yourself as trustee, to my order, for $4,309, together with a blank receipt for me to sign acknowledging a payment of fifty cents a share on Cobre Grande Copper Co. stock owned by me, in your hands as trustee.

I also note that under the contract made by you with Mr. Greene I am not bound to sell my stock unless I so desire. I hereby beg to notify you that I do not desire to sell my stock and I return you herewith the check and blank receipt enclosed to me in your letter.

I also desire to notify you that I am interested in an option already made by you as trustee for the sale to myself and the other persons interested with me, of the stock in your hands as trustee amounting to in the neighborhood of 115,000 shares, and that I have never relinquished said option and that I hereby forbid you to sell or deliver any of the stock in your hands to any person or per-

sons other than the option already made by you with myself and associates.

Yours truly,
(Signed) A. W. HALLENBORG.

PLAINTIFF'S EXHIBIT HALLENBORG INJUNCTION.

Order of injunction in the present case of Hallenborg *v.* Cobre Grande Copper Company. Granted at Prescott, April 11th, 1901, by Hon. Richard E. Sloan, judge, and filed April 11, 1901. Recites, complaint and affidavits of Hallenborg and Bennett, and enjoins defendants from carrying out and enforcing the agreement of December 12, 1900, and the supplemental agreement of December 14, 1900, and from discontinuing the actions brought by the Cobre Grande Copper Company to enforce its rights or claims against Greene, Mitchell and others, referred to in the complaint herein; enjoins defendants from causing to be discontinued or dismissed the action by the Cobre Grande Copper Company, in the third district court, Maricopa county, against Greene, Mitchell and the
167 Phœnix National Bank, heretofore referred to. Also from receiving from the Phœnix bank any escrow papers or documents constituting title to the mining property, and contains order to show cause why a receiver should not be appointed, etc.

DEFENDANTS' EXHIBIT JUDGMENT ROLL.

COBRE GRANDE COPPER COMPANY
v.
GREENE ET AL.

(1.) Summons and amended complaint in action in third district court of Arizona, Maricopa county, between Cobre Grande Copper Company, plaintiff, and William C. Greene, George Mitchell and Phœnix National Bank of Phœnix, defendants.

Already set forth in Pl'ff's Ex. 2.

(2.) Answer and amended answer of W. C. Greene, verified respectively June 20th, 1900, and July 23, 1900.

Already referred to in Pl'ff's Ex. 2.

(3.) Answer and amended answer of George Mitchell, filed July 2, 1900, and October 23, 1900, respectively.

Already referred to in Pl'ff's Ex. 2.

(4.) Injunction order, dated November 25, 1899.

Already referred to in Pl'ff's Ex. 2.

(5.) Decision on motion for injunction. Dated August 2, 1900, as follows:

The plaintiff and defendant, The Phœnix National Bank, are corporations, with their principal place of business in Phœnix, Arizona

Defendant, George Mitchell, is a resident of Maricopa county, Arizona, and defendant, William C. Greene, is a resident of Cochise county, Arizona.

168 Greene and Mitchell are the principal defendants, of whose acts the plaintiff complains; the Phœnix National Bank is the holder of escr deeds and agreements between the defendants Greene and Mitchell.

Plaintiff filed its complaint in this court on the 25th day of November, 1899, and at the same time obtained an order from the court upon which a writ of injunction was issued restraining the defendants Greene and Mitchell, or either of them, from accepting or receiving from the Phœnix National Bank, and restraining said Phœnix National Bank from delivering or surrendering to said Greene or to said Mitchell the following deeds:

A certain deed executed by said William C. Greene to said George Mitchell, conveying to said Mitchell the following claims, viz.: The Mina Grande, No. 370; the Cobre Grande No. 2, registered No. 371; the El Ronquillo No. 2, registered No. 373; the El Chivatera No. 2, registered No. 374; the Pavo Real, No. 375; the La Suerta, No. 376; the La Veta Grande, No. 379; the Perdida, No. 377, and the Esperenze, No. 6117, which said deed is dated November 26th, 1898.

Also a certain deed executed by said William C. Greene to the said George Mitchell, purported to convey to the said George Mitchell the following described patent mining claims: San Ignacio, patent No. 2401; La Chivatera, patent No. 2402; Cobre Grande, patent No. 2403; La Ronquillo, 2649; which said deed is dated November 26th, 1898, together with all contracts, agreements and memorandums and any and either of the same executed by the said William C. Greene, George Mitchell and the Cobre Grande Copper Company, or either of them, connected with or in any manner referring to said deeds, or either of them, or the property therein described, and now in the hands of the said Phœnix National Bank, in escrow or otherwise.

169 The complaint upon which said order was granted is voluminous and contains as exhibits, made a part of the complaint, copies of certain original agreements and deeds between the defendants Greene and Mitchell and the Cobre Grande Copper Company. The whole complaint, taken with the exhibits, alleges or attempts to allege the following state of facts:

I.

That on the 26th of November, 1898, the said Greene, being the owner of mining properties in the State of Sonora, Republic of Mexico, executed an agreement in writing to said Mitchell, wherein he agreed to sell all of said mining properties, which are afterwards known as the Cobre Grande mining properties, for the sum of $250,000, of which sum $12,500 was then by Mitchell paid in cash, and the balance of such purchase price, $237,500 was to be paid as follows: $37,500 on or before the 26th day of November, 1899;

$100,000 on or before the 26th day of November, 1900; $100,000 on or before the 26th day of November, 1901.

That said agreement recited as follows: "And, whereas, the party of the first (Greene) is desirous of putting the party of the second part (Mitchell) in immediate possession of said properties and to work and operate the same."

And further contains the following: "That the said Mitchell is hereby granted the right and permission to enter upon and take possession of said properties and every part thereof, and may work and operate the same, extract or ship or treat the ores thereof upon the premises or elsewhere."

Mitchell, upon his part, agreed to put upon the premises a water jacket smelting furnace, and that out of the returns of all ores or bullion to pay Greene fifty per cent., and that the same should be applied by Greene upon the purchase price.

That the better to carry out said agreement between Greene and Mitchell, Greene executed to Mitchell deeds conveying said
170 property, and placed the same in the hands of the defendant, The Phœnix National Bank, in escrow, where the same were at the time of the filing of the complaint.

That the said agreements were entered into and the deeds executed for the purpose and intent that said Mitchell organize a corporation under the laws of the Territory of Arizona, for the purpose of taking title to and developing and operating said mines and mining claims. That afterwards Mitchell did organize such a corporation which is the Cobre Grande Copper Company, this plaintiff, and that both Greene and Mitchell were stockholders therein and members of the first board of directors thereof.

That upon the organization of such company Mitchell transferred his contract with Greene to said company with the full knowledge and consent of Greene, and at his request.

That thereafter said company sold large amounts of stock to many and various people upon the faith and credit of the contracts between Greene and Mitchell and the assignment thereof of the corporation.

That thereafter the corporation, the Cobre Grande Copper Company, plaintiff herein, went into possession of said mining properties, and commenced to operate and develop the same, and remained in possession for a long while thereafter, until ousted from such possession by defendants Greene and Mitchell. That while they were in possession, in conformity with the contract between Greene and Mitchell and assigned to the company, they erected a smelter, provided for in the agreement, at a cost to the said company of about the sum of $60,000, and that at the time plaintiff was ousted of its possession defendants Greene and Mitchell obtained possession of the products which were the result of the working of said mines by plaintiff, in the sum of $50,000.

That the defendant Greene organized another company, called the Cananea Consolidated Copper Company, of which he, the said

Greene, was practically the entire owner, and that said Greene placed the said Cananea Consolidated Copper Company in possession
171 of said mines, and ever since said Cananea company has been operating said mines for their own benefit and to the exclusion of the Cobre Grande Copper Company, plaintiff. That said ouster and transfer happened on or about the 11th day of October, 1899, before the said first payment of $37,500 became due.

That all said acts were done and performed by defendants Greene and Mitchell with the design, the purpose and the intent to defeat the Cobre Grande Copper Company in the obtaining of its rights under its assignment from Mitchell of his contract with Greene, and to defeat its efforts to obtain title as in said agreements provided.

Plaintiff further alleges that it is now proceeding in and through the courts of the State of Sonora, in the Republic of Mexico, where said mining properties are situate, to recover possession of said mines from defendant Greene and the Cananea Consolidated Copper Company, and that it is diligently pursuing its remedy.

That defendants Greene and Mitchell threaten and intend on the 27th day of November, 1899, when the first instalment of $37,500 becomes due, if the same be not paid on or before the 26th day of November, 1899, to demand from said Phœnix National Bank the deeds and agreements held by it in escrow, as heretofore alleged.

Wherefore, plaintiff prays that defendants Greene and Mitchell be restrained from making such demand and the Phœnix National Bank be restrained from complying with such demand until the further order of this court; and that the plaintiff may be permitted to make said payment of $37,500 within a reasonable time after it shall be restored to the possession of the said mines and mining claims and property.

To this complaint the defendants Greene and Mitchell demur for that the same does not state facts sufficient to constitute a cause of action. Demurrer was heard by this court on the 26th day of June, 1900, and after a full argument the court made the following
172 order:

"The defendants demur to the plaintiff's complaint herein having been heretofore argued and submitted to the court for its decision and by the court taken under advisement, now, this day, the court, being fully and sufficiently advised in the premises, orders that the demurrer, as aforesaid, be sustained; that the injunction be continued and leave granted plaintiff to amend its complaint within thirty days."

The plaintiff filed its amended complaint on the 21st day of July, 1900; whereupon the defendant Greene moved to dissolve the injunction upon the allegations of the amended complaint, the admissions contained in the original complaint and upon the denials of the answer filed by the said Greene.

Said motion for dissolution came on to be heard before the court on the 30th day of July, 1900.

II.

Upon the hearing of the demurrer the court was of the opinion that the complaint was not sufficiently definite as to the possession granted by Greene to Mitchell being a part of the original contract that the recourse necessarily had to the exhibits, which were a part of the complaint, was too much of the nature of argument or an inference; that while it might be justly and properly argued or inferred that such possession was a part of the contract as gathered from the exhibits, yet the complaint in that particular ought to plainly state the facts. Also, that it fails to fully show such acts of the defendants as would make it excusable for the plaintiff to refuse to pay the first installment of $37,500 by the 26th of November, and which would make it proper for a court of equity to extend the time of such payment.

At the time the court sustained the demurrer to the original complaint it was within its discretion to continue the injunction until such time as plaintiff could amend its complaint, and did so continue it. If the plaintiff has not cured the defects in the complaint
173 by its amendment, it is within the province of the defendants to move for dissolution of the injunction, and thus we are brought again to an examination of the cause of action as now stated by the plaintiff.

The plaintiff, to cure the defects of the original complaint, makes an amendment which we summarize as follows:

That at the time of the execution of the contract between Greene and Mitchell and of the organization of the Cobre Grande Copper Company and the assignment of said contract to said company, it was contemplated and intended by all the parties that said company should have the sole and exclusive possession of said mines and the sole and exclusive right to mine the same, and that the means of making the deferred payments and paying for said mines would be made largely out of the proceeds of the ore, matte and bullion produced from them by said company. Other allegations were added charging fraud in the intentional disposition of the title to said mines to a corporation created by said Greene, of which he is the substantial owner, which called for the interposition of a court of equity to control the title deeds in escrow and the payments falling due thereon until such title by reason of such fraudulent acts can be put in such condition as would make it proper for the plaintiff to pay the purchase money thereon without extra jeopardy or hazard.

The court deems the amended complaint sufficient to support the injunction. Unless it should be dissolved upon the allegations of the answer, as having fully and sufficiently denied the equity of the plaintiff's complaint, the motion must be denied.

Whether or not the complaint sets out any other reasons for equitable interposition, it does state this fact, to wit, that the defendant Greene contracted to convey title upon the payment to him of a certain amount of money, in deferred payments specified; that before

the first payment became due, he fraudulently disposed of the title to another; that his acts make it unsafe for the party to whom
174 he agreed to convey title to make further payments; that legal proceedings are being had to correct the fraud practiced by Greene; that a court of equity is asked to retain possession of the title deeds until such judgment can be had.

Defendant's denials and allegations are quite as profuse as the allegations and charges in the complaint, but the only one vital thing that we will discuss is what is alleged and denied about Greene tampering with the title which he agreed to convey.

Where one has agreed to convey title and has executed deeds in accordance with that argument, and placed the deeds in escrow to be delivered to the purchaser upon his performance of the conditions of the purchase and before the time arrives for the performance of the conditions, the owner disposes of the title in such a way as would make it futile for the purchaser to perform the conditions, but instead thereof takes legal steps in the proper course to undo the wrong which the seller has committed, so as to be able to perform the conditions with safety and enforce a specific performance from the seller, a court of equity will seize hold of the title deeds and regulate the time for the performance of the conditions so that the rights of the purchaser can be completely protected. In such cases the only question is, has the owner committed the frauds and performed the acts which make it necessary for the purchaser to take such legal steps, and are such legal steps being taken?

Without referring to the numerous denials and allegations of the answer as to the various matters alleged in the complaint, we will refer to his answer to that vital point, which is as follows:

"This defendant, upon information and belief, denies that the plaintiff is proceeding in the State of Sonora to recover possession of said mines from said Cananea Consolidated Copper Company, but whether they are proceeding to do so or not, he calls in question the prophecy in said complaint that they will regain possession of said mines and property and supplies as alleged and he questions
175 the prophecy that within a reasonable time the plaintiff will be able to make the payment of $37,500. But he alleges that whether they be able to do so or not is a matter of no concern to him, for the reason that the plaintiff does not tender the payment of the said sum of money in the complaint herein; has never paid the said sum of money to the said bank to the credit of the defendant Greene; has never offered to pay the said sum of money to the said Greene; and that the time has now expired when he has the right to do so. And not having offered to do equity, and not having offered to perform the contract, he admits it is violated, said plaintiff has not standing in a court of equity, and this bill should be dismissed upon the allegations of this bill upon that subject. Said defendant Greene denies that under the terms of the contract the possession and operation of the said mines had anything to do with the payment of the purchase price as aforesaid.

And denies that the inability of the said company on the 26th day of November, 1899, to pay the said $37,500 was due to any wrongful act of said Greene, or any act of his or the said Mitchell. And denies that by any acts of his or the said Mitchell that the said company was unable on the 26th day of November, to pay the said sum as provided for by said contracts.

This defendant denies that the payment of the said $37,500 as aforesaid, was in any way conditioned or depended upon the possession of the said mining ground or mining property.

That in said contracts the plaintiff had the right at any time to pay the whole of the purchase price aforesaid of the mines and to become the owner in fee simple thereto, and the holder of the paramount title, and to take and receive the delivery of the said deeds at any time and until it, the said plaintiff, should do so, it
176 had no right whatever to the possession of said properties and said mines, except such rights as were found in the contract of operation above stated.

And that said contract of operation above set forth gave to the plaintiff a license to operate said mines, but the said right was not exclusive, and the said defendant Greene had the right to revoke the same at any time for the protection of his rights in said property.

And the said defendant denies that the said plaintiff has been wrongfully deprived of the possession of said properties, but that in the operation of the same in fraud of the rights of said Greene that it involved said property in debt, which covered it with liens and obligations, and as above set forth, it became absolutely necessary for the defendant's rights, to take possession.

But he alleges that the taking possession of the said property by him in no way prevented, or ought it to prevent, the plaintiff from paying the purchase price and performing the conditions of the escrow, if it had seen fit to do so, and it can claim no rights for the failure to perform the terms thereof, and can claim no rights in a court of equity without offering to perform the terms of said contract, which would be to pay and settle all the obligations and debts as aforesaid of said company and said $37,500."

The answer has not so completely met the equities of the complaint, in regard to the vital point as to require the dissolution of the injunction. Therefore motion is denied, and the injunction is retained until plaintiff can have a reasonable time to get a determination of its cause in the courts of Mexico, where the property is situate, and have had opportunity to be placed in the possession of the mines and have had title to them adjusted so that it may act under the contract without molestation from the defendants
177 and without jeopardy to its money due on deferred payments.

It is so ordered.

Dated this 2nd day of August, A. D. 1900.

WEBSTER STREET, Judge.

(Endorsed:) Original.—No. 3,437.—The Cobre Grande Copper Company, plaintiff, *v.* William C. Greene, George Mitchell and The Phœnix National Bank, defendants.—Opinion on motion to dissolve. Filed August 2, 1900. W. C. Foster, clerk.—By L. B. Street deputy.

6th. Judgment dated April 15, 1901, signed by Webster Street judge, as follows:

This cause having come on regularly to be heard on the 23rd day of October, 1900, L. H. Chalmers, Esq., Baker & Bennett *et al.*, appearing as attorneys for plaintiff; Hon. Norton Chase, W. C. Barnes *et al.*, appearing as attorneys for defendants; and the hearing of the same having proceeded with the evidence being adduced on the part of both the plaintiff and the defendants, covering a period of many days, and the cause fully argued before the court, and submitted to the court for judgment, and being by the court taken under advisement, and the court being now fully advised in the premises, does hereby make its findings of fact, conclusions of law and judgment as follows, to wit:

The court finds that none of the material allegations of plaintiff's complaint have been sustained, and concludes that the remedy sought being an injunction remedy, no injunction should be issued or maintained thereon, and that plaintiff's action should be dismissed.

Wherefore, it is ordered, adjudged and decreed, that plaintiff's action be dismissed, that the injunction heretofore existing, pending the hearing and determination of the suit be dissolved, and all the property, papers, deeds, contracts, escrows and every other in-
178 cident to the injunction be delivered to the defendants W. C. Greene and George Mitchell, by the defendant, The Phœnix National Bank, the escrow holder thereof, and that the defendants have and recover from the plaintiff their costs and disbursements herein, taxed at one hundred and thirteen 55/100 dollars.

Done in open court this 15th day of April, 1901.

WEBSTER STREET, Judge.

(Endorsed:) No. 3,437.—The Cobre Grande Copper Company *v.* W. C. Greene *et al.*—Judgment (docketed).—Filed April 15, 1901, 11 a. m.—W. C. Foster, clerk.—Entered Book "G," page 289.

DEFENDANTS' EXHIBIT TEXAS JUDGMENT ROLL.

(1.) Petition of Cobre Grande Copper Company, filed January 31, 1900.

(2.) Amended petition of the Cobre Grande Copper Company, complainant, against Consolidated Kansas City Smelting & Refining Co. *et al.*, respondents, filed June 14, 1900, as follows:

Comes now the plaintiff, and with leave files second amended petition:

Your complainant, The Cobre Grande Copper Company, a corporation organized under the laws of the Territory of Arizona, having its principal office in Phœnix, Maricopa county, said Territory, and by virtue of its charter, carrying on mining and smelting operations in the State of Sonora, Republic of Mexico, hereinafter styled complainant, respectfully complains of the Consolidated Kansas City Smelting & Refining Company, a corporation duly incorporated and organized, and doing business in the county of El Paso and State of Texas, and having as its local agent, F. C.
179 Earley, the Cananea Consolidated Copper Company, a corporation, of which William C. Greene claims to be president; the Consolidated National Bank of Tucson, a national banking corporation, organized under the national banking laws of the United States of America, which has its principal office in the city of Tucson, said Territory of Arizona, the names of whose officers complainant is unable to give; and Scott White and William C. Greene, who each reside in Cochise county, Territory of Arizona; George Mitchell, who resides in Yavapai county, Territory of Arizona; George A. Treadwell and Win Wylie, who each reside in Maricopa county, Territory of Arizona, hereinafter styled respondents, and your complainant shows to the court:

1st. That your complainant holds the title to and right to the possession of certain mines and mining property and a smelter situated in the municipality of Fronteras, district of Arispe, State of Sonora, Republic of Mexico, which mines and mining property consist of the following mines and mining claims:

San Ignacio, La Chivatera, Cobre Grande, El Ronquillo, Mina Grande, Cobre Grande No. 2, El Ronquillo No. 2, El Chivatera No. 2, Pavo Real, La Guerta, La Veta Grande La Perdida, El Esperenza and Eliza, all of which mines and mining claims are in one group, and also other mines contiguous to those above stated; and on said mines and mining property is situated a smelter belonging to complainant, for the reduction and concentration of copper ore into copper matte; and on, to wit: the 13th day of October, 1899, said defendants, W. C. Greene, Scott White, George Mitchell, G. A. Treadwell, Win Wylie and the Cananea Consolidated Copper Company illegally entered upon said mines, mining property and smelter and deprived complainant of possession of same, and are still illegally holding same, and are extracting the ore from said mines and are using the said smelter to concentrate the same into copper matte, and shipping said copper matte from said mines and selling same and appropriating the proceeds thereof to their own use.

180 2nd. That said respondents, Greene, White, Mitchell, Treadwell and Wylie, and the Cananea Consolidated Copper Company, have placed in the possession of their correspondents, the Consolidated National Bank of Tucson, one hundred and sixty thousand pounds of said copper matte, which said copper matte was taken from the above described mines or some of them, and which matte said bank shipped about January 9, 1900, from Tucson, Arizona, to

El Paso, Texas, in railroad cars, described as follows: Car marked S. P. No. 36,520, containing sixty thousand pounds; car marked S. P., No. 14,385, containing forty thousand pounds; car marked S. P., No. 83,337, containing sixty thousand pounds of said copper matte, and has delivered the copper matte shipped in said cars to its correspondent, the Consolidated Kansas City Smelting and Refining Company, at the works of said company, located near the city of El Paso, in El Paso county, Texas; that said hundred and sixty thousand pounds of said copper matte is of the reasonable value of eight thousand dollars and said company correspondent now has the same at its works in the said county of El Paso, Texas.

3rd. And your complainant fears that the said Consolidated Kansas City Smelting and Refining Company will deliver to their correspondents the copper bullion reduced from said matte or pay to them the value thereof.

4th. That in the year 1898, and prior thereto, the respondent, W. C. Greene, was the owner of the above described mines and mining property in the State of Sonora, Republic of Mexico; that on the 26th day of November, 1898, an agreement was made and entered into by and between William C. Greene, of Cochise county, Arizona, and George Mitchell, of Yavapai county, Arizona, a copy whereof is attached to this petition, and marked "Exhibit 1, copy Greene-Mitchell contract No. 1," and is made a part of this petition
181 as fully as though recited at length herein; that on the 26th day of May, 1899, George Mitchell conveyed to the Cobre Grande Copper Company two certain escrow agreements, and certain mining property by a deed of assignment hereto attached and made a part of this petition, as fully as though written at length herein, and marked "Copy of Assignment of Greene-Mitchell Contract No. 1 to Cobre Grande Copper Company;" that on the 28th day of June, 1899, George Mitchell executed a receipt for one hundred and ninety-nine thousand nine hundred and ninety-five shares of the capital stock of the Cobre Grande Copper Company, which said receipt is hereto attached, marked for identification, "Copy receipt from Mitchell to Cobre Grande Copper Company for stock payment," which said receipt is made a part of this petition as fully as though recited at length herein.

On the 22nd day of July, 1899, W. C. Greene, George Mitchell and the Cobra Grande Copper Company entered into a contract in writing which is hereto attached, marked for identification "Copy of modified contract No. 2, Greene-Mitchell, July 22nd, 1899," and is made a part of this petition as fully as though recited at length herein; that on the 26th day of November, 1899, William C. Greene conveyed to George Mitchell certain mining claims situated in the municipality of Fronteras, district of Arispe, State of Sonora, Republic of Mexico, by deed hereto attached and marked "Exhibit X" for identification, and made a part hereof as fully as though recited at length herein; that on the 26th day of November, 1898, William C. Greene conveyed to George Mitchell certain mines and mining

claims situated in the State of Sonora, Republic of Mexico, by deed, a copy of which is hereto attached marked "Exhibit Y" for identification, and made a part of this petition as fully as though recited at length herein; that on the 26th day of November, 1898, William C. Greene and George Mitchell entered into an agreement in writing, a copy of which is attached marked "Exhibit Z" for identification, and made a part of this petition as fully as though
182 recited at length herein; that on the 15th day of March, 1899, W. C. Greene wrote an order or letter to the Phœnix National Bank of Phœnix, Arizona, a copy whereof is hereto attached, marked "Exhibit M," and made a part of this petition as fully as though recited at length herein; that on the 26th day of November, 1898, William C. Greene and George Mitchell entered into an agreement, a copy whereof is hereto attached, marked "Exhibit N" for identification and made a part of this petition as fully as though recited at length herein; that on the 26th day of November, 1898, the Cananea Copper Company, by W. C. Greene, its attorney in fact, conveyed to said William C. Greene certain mining property situated in the State of Sonora, Republic of Mexico, a copy whereof is hereto attached and marked "Exhibit O," and made a part of this petition as fully as though recited at length herein; that on the 26th day of November, 1898, the Cananea Copper Company, by W. C. Greene, its president and attorney in fact, executed an agreement, a copy whereof is hereto attached marked "Exhibit P" and made a part of this petition as fully as though recited at length herein; that on the 15th day of April, 1899, W. C. Greene executed an agreement, a copy whereof is hereto attached, marked "Exhibit Q" and made a part of this petition as fully as though recited at length herein; that on the 15th day of April, 1899, W. C. Greene executed in writing a certain order on the Phœnix National Bank, a copy whereof is hereto attached marked "Exhibit R" and made a part of this petition as fully as though recited at length herein; that on the 15th day of April, 1899, W. C. Greene, attorney in fact of the Cananea Copper Company, executed a certain written order to the Phœnix National Bank, a copy whereof is hereto attached marked "Exhibit S" and made a part of this petition as fully as though recited at length herein; that on the 26th day of November, 1898, E. M. Sanford, attorney for Mitchell, and William H. Barnes, attorney for W. C. Greene, executed jointly an order to the Phœnix Na-
183 tional Bank, a copy whereof is hereto attached marked "Exhibit T" and made a part of this petition as fully as though recited at length herein; that on the 22nd day of July, 1899, W. C. Greene and Ella Greene executed a mining deed for the Cobre Grande Copper Company, a copy whereof is hereto attached marked "Exhibit U" and made a part of this petition as fully as though recited at length herein.

That on the 26th day of November, 1898, W. C. Greene made and executed for value an agreement in writing to sell said mines and mining property to the respondent George Mitchell. Said agree-

ment is hereto attached, marked "Exhibit 1, copy Greene-Mitchell contract," which said agreement was then placed in the hands of the Phœnix National Bank of Phœnix, Arizona; in escrow with the deeds, agreements and orders hereinbefore mentioned. That with the intent of carrying said agreement into effect, said W. C. Greene executed deeds of conveyance of the said mines and mining properties to the said George Mitchell, copies of which said deeds are hereto attached and marked "Exhibits X, Y, Z," and placed them also in escrow in the Phœnix National Bank of Phœnix, Arizona, to be delivered to the said Mitchell upon certain payments specifically set out in escrow agreements, copies of which said escrow agreements are hereto attached and marked "Exhibits —," which said agreements were also placed in the hands of said Phœnix national bank, and which payments covered a period of several years subsequent to the 28th day of November, 1898. Said agreements provide, among other things, in substance, that should Mitchell fail to make the first of any subsequent payments, said deeds should revert to Greene and no title should pass.

Copies of all of said deeds, agreements and orders are hereto attached and made a part of this petition, among others, being one in which said W. C. Greene bound himself upon compliance with the terms of said escrow to continue to hold title as a trust for George Mitchell, or his assigns, until such time as the said Mitchell or his assigns may demand a deed therefor, etc.

184 In this agreement, a copy whereof is hereto attached, marked "Exhibit Q," it was recited that said agreement was made because W. C. Greene had a permit from the Mexican government allowing him the privilege of owning property within the frontier zone of twenty leagues.

That said instruments and deeds executed between said W. C. Greene and the said George Mitchell were executed with the intent and for the purpose that the said Mitchell should form and organize a corporation under the laws of the Territory of Arizona, for the purpose of taking title to and developing and operating said mines and mining claims and smelter, in which corporation it was agreed between them that said Greene should become a stockholder, under which agreement said Mitchell and Greene proceeded to incorporate and organize your complainant, the Cobre Grande Copper Company, with capital stock of $500,000 divided into 200,000 shares of the par value of $2.50 each, the said W. C. Greene and George Mitchell and defendant George A. Treadwell being among the original incorporators, and which said corporation was by its charter, given power to acquire by location, purchase or otherwise, mines of all kinds and nature whatsoever and to operate, lease or sell the same, to erect and maintain mills, reduction works, concentrates, etc. That by its said charter it was provided that the affairs of this corporation should be conducted by a board of directors consisting of five persons, each of whom must be a stockholder of this corporation and shall be elected annually in November by the stockholders of this corpo-

ration at such time and manner as shall be prescribed by the by-laws. It was further provided that said board of directors should have power to fill vacancies in their number, or to appoint or elect such officers for conducting the affairs of said corporation as they shall see fit.

And immediately upon the incorporation and organization of your complainant, which was about the 22nd day of April, 1899, the said Mitchell, with the consent of the said William C. Greene,
185 transferred, assigned and sold to your complainant, the said contract between the said Greene and Mitchell for the said properties of the said Mitchell in the said mining claims, a copy whereof is hereto attached and marked "Copy assignment Greene-Mitchell contract No. 1 for identification," together with all his interest in said mining claims and appurtenances thereto and his option to purchase the same. That thereupon, by and with the consent and assistance of the said William C. Greene, the said Mitchell sold to divers and numerous persons within and without the Territory of Arizona, shares of the capital stock of this complainant for and on behalf of this company and received therefor large sums of money on account and in behalf of this company; and that said sales of stock were made upon the faith and credit of the assignment and sale of the said contract between Greene and Mitchell and of the said mining claims and options to purchase same, and that immediately thereafter this complainant entered into and upon said property, and that the monies derived from the sale of its capital stock aforesaid, commenced working, operating and developing said mines, mining properties and the smelter, and so continued in the possession, operation and development thereof until the wrongful acts of the co-respondents, Greene and Mitchell, and the Cananea Copper Company hereinafter and hereinbefore set forth. That with the monies derived from the sale of the capital stock of said company and by pledging its credit, this complainant had greatly improved, developed and equipped said mining properties and under the management and protection of this company and its operation, the said mining properties have developed great value, richness and productiveness. That this company has erected extensive and expensive machinery upon said claims for the purpose of operating the same and has secured large stores of supplies and material used in the operation of said mines and also large quantities of bullion, matte and concentrates and other works to said mines and placed said mines and mining proper-*ritory of Arizona, in and for Maricopa*
186 *county, setting* ties upon a substantial, working and prospectively profitable basis.

5th. That the annual meeting of the stockholders of your complainant for the election of directors thereof for the ensuing year was held in the office of this company in the city of Phœnix, Maricopa county, Arizona, Tuesday, the 14th day of November, 1899, which said place and time is the place and time provided by the articles of incorporation and by-laws of your complainant for the

holding of said annual meeting, and that said annual meeting was held in pursuance of the notice of time and place of said meeting duly mailed and served upon each of the stockholders of this company for the length of time provided by the articles of said corporation and by-laws of this company, prior to the holding of said meeting.

That at said election a majority of the stock of this corporation, to wit: 113,340 shares, aggregating $283,350 of the capital stock was duly and legally represented and voted by the stockholders of this company, and the following named persons received a majority of all the votes cast at said election, and a majority of the votes that could have been cast under the capital stock of said corporation, and which said votes represented a majority of the stock of your complainant, and were then and there duly declared to be and were elected to be the directors of said corporation for the ensuing year, to wit: E. B. Gage, J. Henry Wood, Con O'Keefe, Aurelio Melgarejo and W. M. Adamson. That the said directors are now the only legally elected and constituted board of directors of your complainant and are acting as such board. That immediately after the said election the said board of directors organized by electing the said E. B. Gage to be president, and the said J. Henry Wood to be the secretary and treasurer for the incorporation for the ensuing year from the date of said election. That the said president and secretary and directors respectively accepted the said offices and ever since have been and are now acting as
187 such officers. That at the said meeting a resolution was unanimously and ordered spread upon the minutes, to the effect, in substance, that whereas, W. C. Greene, by a fraudulent misrepresentation, has obtained the possession and control of the property of this company in Sonora, Mexico, be it resolved, that the actions of the said Greene are condemned, etc. That the directors of this company be, and they are hereby authorized and directed to institute all necessary legal proceedings to recover and obtain the possession of said property before the courts and authorities, judicial or otherwise, of the Mexican Republic, and to institute such legal proceedings either in the United States of America or in the Republic of Mexico, against said Greene and those acting with him, as may be necessary to compel an accounting to this company for all monies and property so taken, etc.

That on the 15th day of November, 1899, the directors of the Cobre Grande Copper Company met at the office of said company in Phœnix, Arizona, said meeting being an adjourned meeting from November 14th, 1899, duly and legally called, and adjourned to November 15th. That at said meeting of directors, E. B. Gage was elected president, Aurelio Melgarejo was elected vice-president and J. Henry Wood was elected secretary and treasurer.

7th. That the said board of directors and the said president and secretary ever since the said election have been and are now in the possession of all the books papers, records and the seal of your com-

plainant, and ever since said election have been and now are the only legally constituted board of directors and officers of this company.

8th. And complainant further alleges that on, to wit: the 23rd day of September, 1899, and while the said William C. Greene was a director of the complaining company, the said William C. Greene, conspiring and confederating with respondents George Mitchell and one George A. Treadwell, both of whom were then also directors of the complaining company, for the purpose and with the intent and object of hindering and embarrassing the complainant, in its operations of said mining properties, and with the purpose and intent to prevent the complaining company from making the first payment to fall due under the terms of the escrow agreements, transferred by respondent Mitchell to this company, and for the purpose of claiming a forfeiture to all the rights of the complainant company by virtue of said escrow agreements and the reversion of all of said mining properties to William C. Greene, according to the terms of said escrow agreements, understood and attempted to hold a meeting of the directors of this company; that, thereupon the complaining company sought and obtained from the district court of the third judicial district of the Territory of Arizona in and for the county of Maricopa, a writ of injunction, prohibiting them from holding said meeting. Which said injunction order was duly served upon the said Greene, Mitchell and Treadwell before the holding of said meeting; which said injunction was on the 11th day of January, 1900, duly and legally served on the defendant, George Mitchell, and was on the 10th day of January, 1900, duly and legally served on the defendant, Scott White, and was on the 22nd day of December, 1899, duly and legally served on the defendant William C. Greene.

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That in defiance and disobedience of said injunction, the said Greene, Mitchell and Treadwell undertook and pretended to hold a meeting of the directors of said corporations at Bisbee, Arizona, on said 23rd day of September, 1899, at which meeting there were present and represented only Greene, Mitchell and Treadwell, and said meeting pretended and attempted to remove one J. H. Costello, who was then the duly elected and acting president of this company, and one J. H. Wood, who was then the duly elected and acting secretary and treasurer of this company, from their respective offices in said company and to elect a board of directors composed of the following persons, to wit: William C. Greene, George Mitchell, George A. Treadwell, Win Wylie and Scott White, and to elect William C. Greene to be their president and one Scott White to be secretary and treasurer thereof.

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That thereupon the said William C. Greene and Scott White pretended and held themselves out to be the president and secretary and treasurer of your complainant company, and notified all parties with whom the said company had dealings that the said Costello and Wood were no longer officers of said company and warning all

persons dealing with said company not to deal with said Costell and Wood, but with the said William C. Greene and Scott White as the officers of said company, and demanded and succeeded i obtaining the mail addressed to said company, and demanded an succeeded in obtaining returns from ore bullion and concentrates theretofore shipped by said company to various smelters and firm throughout the United States, and endeavored and attempted t usurp all the functions of the said offices of president and secretar and treasurer of this company.

9th. That thereupon the respondents, Greene, Mitchell, White Treadwell and Wylie, proceeded to the mines and mining properties of this company in Mexico. That thereafter these respondents act ing in conjunction, and while the said Greene and Mitchell were still directors of the complaining company, and the said Greene wa assuming to be and acted as president thereof, demanded and b threats, intimidations, and false representations, succeeded in obtain ing possession of all the said mines and mining properties an smelter, together with all the improvements and appurtenances an appliances placed thereon by this company, and also all the sup plies purchased and provided by this company for use in the work ing and operation of said mining properties, and which sai
190 supplies were of great value, to wit: the sum of $25,000 That by the means aforesaid the respondents, Greene, Mitchell Wylie, Treadwell and White, have succeeded in obtaining possessio of said products of said mines and of the returns from the variou smelters to whom the products of said mines had been shipped amounting, as this plaintiff verily believes and so charges, to th sum of $50,000, and have succeeded in obtaining possession of sai mines and mining property and smelter. That on, to wit: the 30t day of September, 1899, said William C. Greene, while still a di rector of the company, and assuming to be its president, for th purpose and with the intent hereinbefore stated, organized a corpo ration in the State of Sonora, Republic of Mexico, denominated th Cananea Consolidated Copper Company, and thereafter, to wit: o the 11th day of October, 1899, the said William C. Greene, for th purpose and with the intent aforesaid, attempted, pretended an assumed to convey to the said Cananea Consolidated Copper Com pany all of the mines, mining property and smelter, hereinbefor described and all the options to purchase the same. That the sai conveyances were made by the said Greene, under a claim falsel asserted by him, that the said George Mitchell and his assigns, thi complainant, had failed to perform the conditions of the escrow agreements hereinbefore mentioned, and that thereby the said prop erty and options to purchase the same had become forfeited by th said Mitchell and his assigns, this complainant, and had reverted t said William C. Greene. That the said Greene has conveyed, trans ferred, turned over and delivered the whole of said mines, mining claims, property, smelter, supplies and proceeds to the said Cananea Consolidated Copper Company, of which said company the sai

Greene was the organizer, is the general manager, and practically the entire owner, and ever since the said Greene and the said Cananea Consolidated Copper Company have been operating said mines and mining claims.

10th. That anticipating that by reason of said fraudulent
191 acts of the respondent, this company would be unable to meet a certain payment of $37,500, which by the terms of said escrow agreements that were transferred by respondent Mitchell to this company, became due and payable by the terms of said agreement, November 26th, 1899, this complainant brought suit in the district court of the 3rd judicial district of the Territory of Arizona, in and for the county of Maricopa, setting up the facts alleged herein (in substance), and praying for an injunction restraining the said Phœnix national bank and the said William C. Greene and George Mitchell from demanding or receiving from said bank, and the said bank from delivering or surrendering to William C. Greene and George Mitchell, or either of them, the papers and agreements placed in escrow with said bank as hereinbefore set out. That upon hearing said petition and application, the said court made its order on the 25th day of November, 1899, that a temporary writ of injunction issue in compliance with said prayer. That thereupon on said last named date, a temporary writ of injunction issued from said court, enjoining William C. Greene, George Mitchell and the Phœnix National Bank, of Phœnix, Arizona, from demanding or receiving from the Phœnix national bank, and the said bank from delivering or surrendering to said William C. Greene and George Mitchell, or either of them, said escrow papers (particularly describing them) That thereafter, to wit: on or before the day of ——, apd long before the filing of this petition, said injunction was duly served upon said respondents, and the same is still in full force and not dissolved.

That on, to wit, about the 25th day of November, 1899, the Territory of Arizona, by its attorney-general, C. F. Ainsworth, on the relation of E. B. Gage, J. Henry Wood, Con O'Keefe, Aurelio Melgarejo and W. M. Adamson, brought a *quo warranto* suit against respondents, William C. Greene, George Mitchell, George A. Treadwell, Scott White and Win Wylie, in the district court of the third judi-
192 cial district of the Ter — up, in substance, the facts herein alleged relative to that issue, and praying that the said respondents be adjudged not to be the directors or officers of the Cobre Grande Copper Company, and not entitled to exercise the rights and franchises of the said company, and that they be ousted of the possession of all the property and effects of said company. Praying, also, that E. B. Gage, J. Henry Wood, Con O'Keefe, Aurelio Melgarejo and W. M. Adamson be adjudged to be the true directors and officers and entitled to exercise the rights and franchises of said corporation and that they be placed in possession of all the property of your complainant. And praying, further, for a temporary writ of injunction, restraining William C. Greene, George Mitchell, George

A. Treadwell, Scott White and Win Wylie from acting as and holding themselves out to be, the directors or officers of the Cobre Grande Copper Company, and from in any manner interfering with or attempting to interfere with the property and effects of said company, and from exercising or attempting to exercise any of its rights and franchises, and from interfering with the acts and doings of said Gage, Wood, O'Keefe, Melgarejo and Adamson, or any of them, as directors and officers of said company. That upon the hearing of *said application, the said court made its order that a temporary writ* of injunction, for the purposes named, issue, which injunction is still in force and not dissolved, and has been duly and legally served upon each of said defendants.

11th. Complainant further alleges that respondents William C. Greene, George Mitchell, George A. Treadwell, Win Wylie and Scott White have not sufficient property to respond to complainant in damages for the wrongful acts above set out. That the Consolidated National Bank of Tuscon has no real interest in this matter, but is permitting its name to be used in said shipments by its corespondents. That the complaining company has no adequate remedy at law, and is without remedy in equity. That unless relief as prayed for be granted by injunction, great and irreparable injury will ensue to complainant, pending the determination of these matters and suits.

193 Wherefore, your complainant prays that your honorable court issue its most gracious writ of injunction restraining said respondent, The Consolidated Kansas City Smelting and Refining Company, its officers, agents, servants, employes and attorneys from delivering to its corespondents, or either of them, their officers, agents, servants, employes or attorneys, all or any of said three cars of copper matte described in paragraph 2nd of this petition, or the bullion extracted from or proceeds of said copper matte, or paying to their co-respondents the value thereof, and restraining said Consolidated National Bank of Tuscon, William C. Greene, George Mitchell, George A. Treadwell, Win Wylie, Scott White and Cananea Consolidated Mining Company, their officers, agents, servants, employes, attorneys, from accepting or receiving from their co-respondents, The Consolidated Kansas City Smelting and Refining Company, all or any part of said three carloads of copper matte or the bullion extracted therefrom, or the proceeds or value thereof, and for citation to each of said respondents, and that upon a final hearing of this cause, complainants have judgment for said copper matte, or its proceeds, and perpetuation of said injunction, and for all such other and further relief as complainant may be entitled to in law or in equity, and as in duty bound your complainant will ever pray, etc.

EDWARD & EDWARDS,
W. M. PETICOLAS,
Attorneys for Complainant.

(Endorsed:) Cobre Grande Copper Company *v.* Consolidated Kansas City Smelting & Refining Company and Consolidated National Bank, Tuscon, *v.* Cobre Grande Copper Company *et al.* Plaintiff's second amended original petition. Filed this 14th day of June, A. D. 1900. I. Alderete, clerk district court, El Paso Co., Texas. M. L. Barlow, deputy.

194 Order of injunction in foregoing action, as follows:

Upon hearing the foregoing verified complaint the same is ordered filed, and it appearing to me therefrom that sufficient cause exists for a temporary injunction to issue therein, it is therefore ordered that a temporary writ of injunction issue in this cause enjoining and restraining the Consolidated Kansas City Smelting and Refining Company, its officers, agents, servants, employes and attorneys from delivering to its corespondents, or either of them, their officers, agents, servants, employees or attorneys, all or any of said three cars of copper matte above descriped, or the bullion extracted from or proceeds of said copper matte, or paying to their corespondents the value thereof, and restraining said Consolidated National Bank of Tucson, William C. Greene, George Mitchell, George A. Treadwell, Win Wylie, Scott White and the Cananea Consolidated Copper Company, or either of them, their officers, agents, servants, employees and attorneys, from accepting or receiving from their correspondent The Consolidated Kansas City Smelting and Refining Company, all or any part of said three car loads of copper matte or the bullion extracted therefrom or the proceeds or value thereof, upon the execution by complaint The Cobre Grande Copper Company, of a bond in the sum of eight thousand dollars.

January 31, 1900.

A. M. WALTHALL,
District Judge El Paso County,
34th Judicial District.

(3.) Answer and amended answer of the Consolidated National Bank of Tucson.

Demurs to plaintiff's petition as insufficient, inequitable and want of jurisdiction, and excepts thereto as insufficient. The answer further generally denies all the allegations of the petition. Denies plaintiff's title to the mines or property described in the petition. Denies the illegal entrance upon the mines and avers title and lawful possession in the Cananea Consolidated Cop-
195 per Company; denies that plaintiff has any interest in the matte in possession of the defendrnt; disclaims any knowledge of the conflict or controversy as to the board of directors or officers of the Cobre Grande Copper Company, alleged in the petition; alleges in detail circumstances resulting in the forfeiture of the Cobre Grande Copper Company's claim to said property. Defendant further alleges that the Cobre Grande Copper Company matte referred to, was

turned over to it by the Cananea Consolidated Copper Company to secure the payment of advances made by the defendant. Denies the jurisdiction of the court because the mines and property are situated in Sonora, Mexico, and that the suit involves the trial of title to real property in the Republic of Mexico, and for other reasons and because this action is a suit for trespass upon real estate, and that there is no jurisdiction. Asks judgment adjudging this defendant to be the owner and entitled to the proceeds of the three car loads of copper matte referred to, and that the value thereof is less than $12.000.

Following is a separate answer and cross-bill of the Consolidated National Bank of Tuscon, alleging peaceful possession by the Cananea Consolidated Copper Company of the mining property in Sonora, Mexico, and that the Consolidated Bank of Tuscon advanced $24,000 in cash to the Cananea Consolidated Copper Company, in consideration whereof the Cananea Consolidated Copper Company sold to the bank the copper matte referred to and delivered it, and the bank shipped it to the Consolidated Kansas City Smelting and Refining Company, at El Paso, Texas, and that if plaintiff had any title to said matte or to the mines, defendant had no knowledge thereof, either actual or constructive; that the Cananea Consoiidated Copper Company being the record owner and in possession and the defendant having no knowledge of any of the matters alleged in the petition, and is an innocent purchaser of said matte.

Further answering, said defendant files a separate cross-bill and complains of the plaintiff and one La Gran Fundicion Cen-
196 tral Mexicana, and also Kuno Doerr, and alleges the consignment of said matte to said Mexican Company, and its manager Doerr, at El Paso, Texas, and that Doerr imported said three car loads into Mexico without the knowledge and consent of the bank, and that they were notified to return the same, but refused to do so on account of some instructions received from the plaintiff, and said company and Doerr are wrongfully holding the proceeds of said matte and they ask an injunction to protect the bank against the Cobre Grande Copper Company, Doerr and La Gran Fundicion Central Mexicana, and for judgment, etc.

(4.) Injunction granted by A. M. Walthall, judge of the 34th judicial district of the State of Texas, February 21, 1900, upon said cross-complaint in favor of the Consolidated National Bank against said parties, forbidding them from interfering with said matte or the proceeds thereof.

(5.) Reply and exception of the Cobre Grande Copper Company to the answer and cross-bill of the Consolidated National Bank of Tuscon. Excepting to said answer and cross-bill for insufficiency, etc., and reasserting facts relative to the title of the Cobre Grande Copper Company to the mines and mining properties.

(6.) Answer of William C. Greene, filed June 14, 1900.

Alleges forfeiture by the plaintiff of the properties referred to in the complaint, and lawful possession upon such forfeiture by Greene,

and conveyance to the Cananea Consolidated Copper Company, which is rightfully in possession.

(7.) Answer of the Cananea Consolidated Copper Company to substantially the same effect.

(8.) Answer of White, Treadwell and Mitchell and Wylie. Demurrer and general denial of the petition.

197 (9.) Exception by the Cobre Grande Copper Company to the cross-answer of the Consolidated National Bank of Tucson.

(10.) Answer of defendant Consolidated Kansas City Smelting and Refining Company alleges that in the month of January, 1900, it received three cars of matte consigned to it by the Consolidated National Bank of Tucson, the proceeds of which are $9,666.21, which it is ready to pay to any party the court may decree.

(11.) Exhibits attached to said pleadings, being copies of certain proceedings in the courts of Sonora, Mexico, relating to the title of the Cobre Grande Copper Company, the Cananea Consolidated Copper Company and W. C. Greene, to the mines and mining properties in question, also copies of certain contracts and agreements between Greene and Mitchell.

(12.) Judgment, etc., in above action as follows:

Cobre Grande Copper Company, No. 3211, *v.* Consolidated Kansas City Smelting & Refining Co., and Consolidated National Bank of Tucson, Arizona, *v.* Cobre Grande Copper Company *et al.*

Whereas, in the above-entitled and numbered cause, pending in the district court of El Paso county, Texas, and in the 34th judicial district of the State of Texas, at a regular term of said court, and on the 15th day of June, 1900, an order was made that the cross-action of the Consolidated National Bank, of Tucson, Arizona, be dismissed as to the La Gran Fundicion Central Mexicana and Kuno Doerr, which is here copied as follows:

Cobre Grande Copper Company, No. 3211, *v.* Consolidated Kansas City Smelting and Refining Company *et al.*, and Consolidated National Bank of Tucson, Arizona, *v.* Cobre Grande Copper Company *et al.*

Be it remembered, that on the 15th day of June, 1900, in the above numbered and entitled cause came the Consolidated National

198 Bank of Tucson, Arizona, by its attorneys, and in open court moved the court for leave to enter without prejudice a voluntary non-suit herein as to its cross-bill against the La Gran Fundicion Central Mexicana and Kuno Doerr, and it appearing to the court that said non-suit will not operate to the prejudice of any other party herein or in this cause, it is therefore considered and ordered that the said Consolidated bank have leave to discontinue its cross-bill as against the said La Gran Fundicion Central Mexicana and Kuno Doerr be, and the same is hereby so discontinued without prejudice to the said Consolidated National Bank in the premises, and it is the further order, judgment and decree of the court that the said La Gran Fundicion Central Mexicana and Kuno

Doerr, do have and recover of the said Consolidated National Bank of Tucson, Arizona, all costs in and about said cross-bill expended, for which let execution issue.

And, whereas, in the same cause and in the same court, during the trial of said cause, and on the 18th day of June, 1900, an order was made that the cross-action of the Consolidated National Bank of Tucson, Arizona, be dismissed as to the Cobre Grande Copper Company, which said order is here copied as follows:

Cobre Grande Copper Company, No. 3211, *v.* Consolidated Kansas City Smelting and Refining Company *et al.*, and Consolidated National Bank of Tucson, Arizona, *v.* Cobre Grande Copper Company *et al.*

Be it remembered, that on the 18th day of June, 1900, in the above numbered and entitled cause, came the Consolidated National Bank of Tucson, Arizona, by its attorney and in open court, and before this cause was submitted to the jury, moved the court for leave to enter without prejudice a voluntary non-suit herein as to the Cobre Grande Copper Company, as to its, the said bank's, cross-bill against the Cobre Grande Copper Company, the La Gran Fundicion Central Mexicana and Kuno Doerr, and it appearing to the court that said non-suit will not operate as to prejudice any other party herein or in this cause, it is therefore considered and ordered that the said Consolidated National Bank have leave to discontinue its said cross-bill against the Cobre Grande Copper Company, the La Gran Fundicion Central Mexicana and Kuno Doerr as against the said
199 Cobre Grande Copper Company (the same having heretofore been discontinued as to the said La Gran Fundicion Central Mexicana and Kuno Doerr), and that said cross-bill above mentioned as against the said Cobre Grande Copper Company (involving the two carloads of matte in Mexico) be and the same is hereby so discontinued without prejudice to the Consolidated National Bank of Tucson, in the premises; and it is the further order, judgment and decree of the court that the said Cobre Grande Copper Company do have and recover of the said Consolidated National Bank of Tuscon, Arizona, all costs by it, the said Cobre Grande Copper Company in — about said particular cross-bill expended, for which let execution issue.

And whereas, in said above-entitled and numbered cause, and in said court, and on the trial of the said cause, to wit, the 18th day of June, 1900, as judgment was rendered that the Cobre Grande Copper Company take nothing by its suit, and that the defendants to its said suit do have and recover of the plaintiff all costs by them in that behalf expended, and that the Consolidated National Bank of Tucson, Arizona, recover of the Consolidated Kansas City Smelting and Refining Company the sum of nine thousand six hundred and sixty and 21 / 100 dollars, for which it may have execution, and that the Consolidated National Bank take nothing of the plaintiff and Z. T. White and A. A. Aronstein, by reason of its prayer for ten per cent. damages, and that the injunction heretofore granted upon the

petition of plaintiff be dissolved, and that the officers of the court do have and recover of the parties hereto the costs by them respectively incurred, for which let execution issue, which said judgment is here copied as follows:

Cobre Grande Copper Company *v.* Consolidated Kansas City Smelting and Refining Company, and Consolidated National Bank of Tucson, Arizona *v.* Cobre Grande Copper Company *et al.*

Be it remembered, that on the 13th day of June, 1900, the
200 above numbered and entitled cause was called for trial, and thereupon appeared the parties, and the plaintiff filed its motion for a continuance, which, after being read and considered by the court, was overruled, to which ruling plaintiff excepts, and on the 13th day of June, and after the overruling of plaintiff's motion for a continuance, the parties were called upon by the court for an announcement, when plaintiff announced it was not ready, and the defendants announced ready, when the trial of the case, all parties being present in person and by attorneys, was ordered to be proceeded with before the court and a jury, and thereupon came a jury of twelve good and lawful men, to wit, W. S. Atherton and eleven others, who were duly selected, empanelled and sworn, and the trial of said cause was proceeded with before court and jury, from day to day until the 18th day of June, 1900, when on said day the jury having heard the evidence and the argument of counsel and having received the charge of the court, retired in care of their bailiff to consider of their verdict, and after due deliberation, returned into open court, the following verdict, to wit:

Cobre Grande Copper Company *v.* Consolidated Kansas City Smelting and Refining Company *et al.*, and Consolidated National Bank of Tucson, Arizona, *v.* Cobre Grande Copper Company *et al.*

We, the jury, in the above numbered and entitled cause, find for the defendants as against the plaintiff, and we further find in favor of the Consolidated National Bank of Tucson, Arizona, against the Consolidated Kansas City Smelting and Refining Company for the value of said three cars of matte, the value of which we find to be $9,060.21.

W. S. ATHERTON, Foreman.

Wherefore, it is the order, judgment and decree of the court that the said plaintiff, The Cobre Grande Copper Company, take nothing by this suit, and that the defendants to its said suit do have and recover of the plaintiff all costs by them in that behalf expended; and
it is further the order and judgment of the court that the
201 Consolidated National Bank of Tucson, Arizona, do have and recover of the said Consolidated Kansas City Smelting and Refining Company the sum of nine thousand six hundred and sixty dollars and 21/100 ($9,660.21) *dollars*, for which it, the said bank, may have its execution against the said Consolidated Kansas City Smelting and Refining Company.

It is the further order, judgment and decree of the court that the

said Consolidated Bank of Tucson do take nothing of the plaintiff, The Cobre Grande Copper Company, and of Z. E. White and A. Aronstein, sureties on the injunction bond of the said plaintiff by reason of its prayer for ten per cent. damages against said parties, to which ruling or judgment the defendants, The Consolidated National Bank of Tucson, except. It is the further order, judgment and decree of the court that the injunction hereinbefore granted upon the petition of plaintiff be and the same is hereby wholly dissolved.

It is the further order and judgment of the court that the officers of this court do have and recover of the parties to this cause the costs by them respectively incurred, for which let execution issue.

And whereas, from said order and said judgment the Cobre Grande Copper Company has taken an appeal to our court of civil appeals for the 4th supreme judicial district of the State of Texas, holding sessions at San Antonio, Texas,

Now, therefore, we, the Cobre Grande Copper Company, as principal, and Fidelity & Deposit Company of Maryland, as sureties, acknowledge ourselves bound to pay to the said Consolidated National Bank of Tucson, Arizona, the Consolidated Kansas City Smelting and Refining Company, the Cananea Consolidated Copper Co., Sociedad Anomina, W. C. Greene, George A. Treadwell, Win Wylie, Scott White, George Mitchell, La Gran Fundicion Central Mexicana and Kuno Doerr, jointly and severally, the sum of six hundred dollars; conditioned, that the said Cobre Grande Copper Company, appellant, shall prosecute its said appeal with effect, and shall pay all
202 costs which have accrued to the court below, and which may accrue in the court of civil appeals and supreme court.

Witness our hands this 16th day of July, 1900.

COBRE GRANDE COPPER COMPANY,
By W. M. PETICOLAS, Its Att'y.

(I. R. stamp, 5c., cancelled.)

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By M. GOGGAN, Director.

Attest: CONROY & RICE, Agents. [SEAL.]

Approved the 19th day of July, 1900.
(Signed) I. ALDERETE, Clerk.

(Endorsed:) No. 3,211.—In the 34th judicial district, El Paso county.—Cobre Grande Copper Company *v.* C. K. S. & R. Co. *et al.*, and Con. Nat'l Bank of Tucson *v.* Cobre Grande Copper Company *et al.*—Cost bond on appeal.—Filed this 19th day of July, A. D., 1900.—I. Alderete, clerk district court, El Paso Co., Texas.—M. L. Barlow deputy.

203 Agreement.

In Court of Civil Appeals, Fourth Supreme Judicial District of Texas.

COBRE GRANDE COPPER COMPANY, Appellant,
vs.
CON. KAN. CITY SMELTING & REFINING CO. ET AL., Appellees.

In this cause comes appellant by its attorneys and shows to the court that this cause has been compromised, wherefore there is no longer any necessity for any decision herein, wherefore appellant prays that its said appeal be dismissed at its own cost.

EDWARDS & EDWARDS,
W. M. PETICOLAS,
Attorneys for Cobre Grande Copper Company, Appellant.

We hereby accept service of the within motion, and agree that said cause may be so dismissed.

FALVEY & DAVIS,
Attorneys for the Consolidated Kansas City Smelting & Refining Company.
CLARK, FALL, HAWKINS & FRANKLIN,
Attorneys for the Consolidated National Bank of Tucson and for W. C. Greene *et al.*

(Endorsed:) Cobre Grande Co., appellant, *v.* Con. Kan. Smel. & Ref. Co. *et al.*, appellees.—Motion by appellant to dismiss its appeal.—Filed in the court of civil appeals at San Antonio, Texas, Dec. 20, 1900.—H. E. Hildebrand, clerk.

204 Judgment of Court of Civil Appeals.

Appeal from District Court (34th District) of El Paso County.

WEDNESDAY, May 15th, 1901.

COBRE GRANDE COPPER CO., Appellant,
vs.
CON. NAT. BANK OF TUCSON ET AL., Appellees. } No. 2208.

In this cause it having been made known to the court that this cause had been compromised and appellant having moved the court to dismiss this appeal at its costs, and appellees having agreed thereto by an agreed motion filed herein on December 20, 1900, it is therefore ordered that this appeal be and it is hereby dismissed, and it is further ordered that appellant, Cobre Grande Copper Company, and its surety, Fidelity and Deposit Company of Maryland,

pay all costs of this appeal, and this decision be certified below for observance.

This judgment is entered *nunc pro tunc* as of date January 2nd, 1901.

SAN ANTONIO, TEXAS, October 28, 1901.

I, H. E. Hildebrand, clerk of the court of civil appeals of the fourth supreme judicial district of Texas, do hereby certify that the foregoing is a true and correct copy of the cost bond on appeal, agreement to dismiss appeal, and of the judgment of the court of civil appeals, in cause No. 2,208, Cobre Grande Copper Co., appellant *v.* Con. Nat. Bank of Tucson *et al.*, appellees.

205 In testimony whereof, I hereunto set my hand with the seal of said court, this same day and the date above written.

[SEAL.] H. E. HILDERBRAND, Clerk,
By J. MURRAY, Deputy.

DEFENDANTS' EXHIBIT AUTHORIZATION OF STOCKHOLDER TO GAGE OF OCTOBER 24, 1900.

For and in consideration of the sum of one (1) dollar, to each of us in hand paid, the receipt whereof is hereby acknowledged, and for further valuable considerations, we, the undersigned, holders of stock in the Cobre Grande Copper Company, do hereby authorize E. B. Gage, trustee, to dispose of the stock set opposite our names, by selling the same or any part thereof outright, or by giving an option for the sale of the same, or any part thereof, upon such terms and conditions as he may deem advantageous to our interest, it being our intention by this instrument to give the said Gage, as full authority and dominion over said stock, for the purpose of selling or disposing of the same in any manner, by option or otherwise, or granting options for its sale or otherwise, as though he were the actual owner of said stock.

Dated this 24th day of October, 1900.

Con O'Keefe	3,156	shares.
W. M. Adamson	8,276	"
D. J. Shea	3,241 6/10	"
O. O. Saxhang	7,238	"
A. R. Ball	2,060	"
Thomas Finerty	1,368	"
E. N. Gage	3,924	"
H. W. Berryman	3,060	"
R. Allyn Lewis	2,634	"
E. B. Knox	2,490	"
P. Sandoval & Co	8,000	"
206 Axel W. Hallenborg, by Grant R. Bennett, atty. in law & fact	8,237 9/10	"
J. H. Costello	40,137 9/10	"
S. D. Dort, by L. H. Chalmers, atty	10,200	"
L. H. Chalmers	454	"
E. B. Gage	50	"

DEFENDANTS' EXHIBIT BENNETT POWER OF ATTORNEY.

Know all men by these presents, that I, Axel W. Hallenborg, of the borough of Manhatten, city and county of New York, have made, constituted and appointed, and by these presents do make, constitute and appoint Grant Robinson Bennett my true and lawful attorney, for me and in my name, place and stead to represent me as fully as I might do if personally present, in any manner wherein I may be interested in the Territory of Arizona or the Republic of Mexico, especially any interest I now have or may hereafter acquire in any real or personal property or contract or chose in action or shares in any corporation or mining company, and particularly in the matter of my interest in the option of June 2nd, 1900; to purchase certain shares of the capital stock of Cobre Grande Copper Company, giving unto the said Grant Robinson Bennett full power and authority to vote my holdings of said capital stock; to make any contract with reference to the same, to institute any suits at law or in equity as he may be advised; to execute all manner of releases, contracts, agreements or deeds having reference to said Cobre Grande Copper Company stock, or any collateral issue in any manner relating to or pertaining to the same; to appear for me as attorney in any action now pending or that may hereafter be instituted in any of the courts of the Territory of Arizona or the United States for said Territory wherein I may be either plaintiff or defendant; to execute any stipulations or dis-
207 continuances or agreements with reference to any litigation in said court. Giving and granting unto my said attorney full powers and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present; with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney, or his substitute, shall lawfully do or cause to be done by virtue hereof.

In witness whereof I have hereunto set my hand and seal this 13th day of October, in the year of our Lord nineteen hundred.

AXEL W. HALLENBORG.

Witness:

ALPHEUS S. FRANK.

(Acknowledged in the State and county of New York on October 18, 1900.)

DEFENDANTS' EXHIBIT "C" POOLING CONTRACT, JANUARY 5, 1900.

This agreement, made and entered into this 5th day of January, 1900, between E. B. Gage, as trustee for certain stockholders of the Cobre Grande Copper Company, an Arizona corporation, a schedule

containing the names of said stockholders, the number of shares of stock held by each of them, and the serial numbers of the certificates of said stock is hereunto annexed and made a part hereof, as the party of the first part, and Benjamin Orne, of New York city, in the State of New York, the party of the second part, witnesseth:

1. E. B. Knox, as the cashier of the Phœnix National Bank, of Phœnix, Arizona, and his successors in such office, is and are hereby nominated as the escrow holder of the shares of the capital stock of said corporation, as per the schedule aforesaid, which said
208 stock and the trustee certificates thereof is to be held, retained, surrendered and delivered by him upon the terms and conditions as follows, to wit: The said stock and the said trustee certificates are to be retained by him in his custody until the first day of April, 1900, and if the said Orne shall on or before that day pay or deposit in said bank to the credit of said cashier the full sum of $84,083.33, lawful money of the United States, then the said Gage, trustee, shall cause to be issued to the said Orne a trustee's certificate equal to one-third of the number of shares described in said schedule and the said cashier shall further hold and retain the said stock and the remaining trust certificates to and until the first day of May, 1900, and if the said Orne shall on or before last-mentioned date pay or deposit in said bank to the said credit the further sum of $84,083.33, then the said Gage, as trustee, shall issue and deliver to the said Orne a trustee's certificate for an additional one-third of the stock mentioned and described in said schedule, and said cashier shall further hold and retain said stock and the remaining trust certificates in his custody to and until the first day of June, 1900, and if on or before said last-mentioned date the said Orne shall pay or deposit in the said bank the further sum of $84,083.33, then the said cashier shall deliver all of said stock and all the remaining trustee certificates to the said Orne or his nominees.

It is understood that $2.50 per share is the purchase price of said stock, and that time is of the essence of this contract and that if the said Orne shall fail or neglect to make any of the payments hereinbefore mentioned, then this option shall have no further force or effect after default of any payments, and all of said stock and all trustee's certificates remaining in the hands of the escrow holder shall be returned to said E. B. Gage.

It is understood and agreed by and between the parties hereto that the said E. B. Gage, trustee, shall procure all stock possible for him to obtain on or before the first day of April, 1900, and place it in the hands of the escrow holder under this agreement and
209 the said Gage shall notify the said Orne in writing, five days before the first day of April, 1900, how much additional stock he has placed in the hands of the said escrow holder, which said additional stock so placed in the hands of the escrow holder shall be an amount that will make the whole number of shares not to exceed 138,000 shares, and all such additional stock so placed in the hands of said escrow holder shall be subject to the same terms

and conditions as to payment or otherwise as heretofore expressed in this option, and shall be added by the escrow holder to the schedule hereunto annexed and made a part hereof.

It is further agreed by and between the parties hereto that the said E. B. Gage, trustee, shall contemporaneously on execution of this instrument deliver to the escrow holder a majority of the stock of the Cobre Grande Copper Company under and by virtue of the terms of this agreement, which company is a corporation organized, as aforesaid, under the laws of the Territory of Arizona, having a capitalization of five hundred thousand dollars ($500,000) and consisting of two hundred thousand (200,000) shares, of the par value of $2.50 per share.

A blank form of the trustee's certificates referred to in this instrument, together with the terms and conditions thereof, endorsed thereon, is attached hereto marked "Exhibit A" for identification.

In witness whereof, the parties hereunto set their hands and seals in original triplicates this 5th day of January, A. D. 1900.

E. B. GAGE, Trustee.
BENJAMIN ORNE,
By ANDERSON T. HERD,
Attorney in Fact.
BENJAMIN ORNE,
By E. N. SANFORD,
His Attorney in Fact.

210 DEFENDANTS' EXHIBIT "D" POOLING CONTRACT OF MARCH 30, 1900.

Between E. B. Gage, as trustee, and L. H. Chalmers, agent, of Phœnix, Arizona. Nominates E. B. Knox as escrow holder of 100,100 shares of stock of the Cobre Grande Copper Company, to be retained by him to June 1, 1900, and if Chalmers shall before that day pay $250,250 therefor, then the stock to be issued to him. Chalmers to advance money from time to time meanwhile as required by Gage to pay obligations of the Cobre Grande Copper Company.

DEFENDANTS' EXHIBIT POOLING CONTRACT JUNE 2, 1900.

Pooling contract between E. B. Gage and L. H. Chalmers for 100,000 shares of stock, to be held by Knox as escrow holder to August 1, 1900, at $2.50 a share, to be paid to said Gage, and if not paid, contract to be null and void. Further agreed that Chalmers should advance to Gage not exceeding $15,000 from time to time to pay necessary expenses of the Cobre Grande Copper Company. Further, that the present directors of the Cobre Grande Copper Company, represented by the pooled stock, are to resign in case the

option is complied with, so that the parties represented by Chalme may elect such directors as they choose.

This agreement, made and entered into this, the second day June, A. D. 1900, between E. B. Gage, as trustee for certain stoc holders of the Cobre Grande Copper Company, an Arizona corpor tion, party of the first part, and L. H. Chalmers, as agent for ce *tain parties to whom he acknowledged his agency, of* Phœni Arizona, party of the second part, witnesseth as follows:

First. That E. B. Knox, who is cashier of the Phœnix Nationa Bank of Phœnix, Arizona, and his successors in office, should ther be any, is hereby nominated as escrow holder of at least on 211 hundred thousand one hundred (100,100) shares of the cap tal stock of the said corporation, which said stock and trus tee certificates therefor are to be held, retained and surrendered an delivered by him on the terms and conditions as follows:

The said stock and the trustee certificates are to be retained b the said escrow holder in his custody until the first day of Augus 1900; and if the said L. H. Chalmers, as agent, shall on or befor that date pay or deposit in the said bank to the credit of the sai escrow holder the full sum of two hundred and fifty thousand tw hundred and fifty dollars ($250,250), lawful money of the Unite States, then the said E. B. Gage, trustee, shall cause to be issued t the said L. H. Chalmers, as agent, the said one hundred thousan one hundred (100,100) shares of stock and trustee certificates there for, and if the said L. H. Chalmers, as agent, shall fail or neglect t pay said sum of money on or before said first day of August, 1900 then this contract and option for purchase shall become null an void, excepting, however, that the said L. H. Chalmers, as agent shall be entitled to receive trustee certificates for twenty thousan (20,000) shares of said stock on or before July first, 1900, subject t the pooling contract endorsed on said trustee certificates, the terms of which are known and fully agreed to by the parties, and for which said L. H. Chalmers, as agent, has this day paid to said E. B. Gage, trustee, the sum of fifty thousand dollars ($50,000), being two and 50/100 dollars ($2.50) per share, which is the price fixed as the value of the said stock. It is understood, however, that the books of said corporation shall show the ownership of said twenty thousand (20,000) shares of stock at once, but the same shall be held by the said E. B. Gage, as trustee, subject to the pooling arrangement above referred to, it being the intention of all the parties to this agreement that the said one hundred thousand one hundred (100,100) and upwards shares of stock shall be held together for voting purposes, the interests of said stockholders being identical.

212 It is further agreed in this connection that if the said E. B. Gage, trustee, shall on or before the said first day of August, 1900, obtain the possession of more than one hundred thousand one hundred (100,100) shares of the said stock, that L. H. Chalmers, as agent, shall be equally bound to take such additional stock at two and 50/100 dollars ($2.50) per share up to one hundred and ten

thousand (110,000) shares, and this obligation shall be as binding as the preceding obligation in reference to the one hundred thousand and one hundred (100,000) shares.

Second. It is further understood between the parties hereto that the Cobre Grande Copper Company is a corporation organized under the laws of the Territory of Arizona, having a capital of five hundred thousand dollars ($500,000), the present condition of which corporation is thoroughly understood at this time by all the parties to this contract.

Third. It is further agreed that the above option is granted upon the condition that the said Chalmers, as agent, shall advance to the said Gage, as trustee, said Gage also being the president of the Cobre Grande Copper Company, such sums of money from time to time for the use and benefit of said company, and in such amounts as may be required by the said E. B. Gage, trustee, not exceeding fifteen thousand ($15,000) dollars, the said money to be used to pay the necessary expenses of the said company until the expiration of this option, the said money to be used under the direction of the said E. B. Gage, trustee.

Whenever any amount of money shall be advanced by the said Chalmers as agent, the said company shall execute to the said Chalmers its obligation in writing for the repayment of the same, said obligation to be executed by the proper officers of the said company.

It is also agreed that written notices shall be given to said Chalmers for such advances of money and the amount required,
213 within the above limit, and if said Chalmers, after receiving said notice of the amount required fails for a period of ten days thereafter to make such advance, then this option shall at once cease and determine, except that said Chalmers, as agent, shall be entitled to receive trustee certificates for twenty thousand (20,000) shares of stock as above mentioned.

Fourth. The fifty thousand (50,000) dollars paid in by said Chalmers, as agent, is to be used by the said E. B. Gage, trustee, as a pro rata payment on the stock above mentioned as a consideration for the time given in this option, but if it becomes necessary in the opinion of the said Gage to buy portions of the said stock of stockholders who refuse to extend the Gage-Chalmers option, the terms of which options are fully understood by all the parties hereto, then he may use such of said money as he may deem necessary for that purpose, the balance to be paid pro rata to the stockholders, who have deposited their stock according to the terms of this contract in the proportion that each stockholder's holdings bear to the total amount of the stock in escrow, except, however, that the thirty-one thousand (31,000) shares of stock, known as the J. H. Costello stock, and which is a part of the said one hundred thousand one hundred (100,100) shares and upwards of stock held in escrow, is not to share in any portion of the money, so, as aforesaid, already paid in by the said Chalmers.

Fifth. It is also understood and agreed between the parties hereto

that the present directors of said Cobre Grande Copper Company, who are represented by the stock above referred to, are to hand in their resignations to take effect upon the expiration of this option in case said option is fully complied with as above provided for, so that the parties who are represented by the said L. H. Chalmers, as agent, may elect such directors as they may choose, but such resignations are to be withdrawn and are to be of no effect unless this
214 option shall be fully complied with and the money paid as above provided.

It is also understood and agreed that the principal parties who are represented by L. H. Chalmers, as agent, take this contract subject to all the obligations which said Cobre Grande Copper Company are under, because of a contract known as the Gage-Orne contract, the terms of which are fully understood by all the parties hereto, so that the said E. B. Gage, as trustee, shall not be subjected to any trouble or damage in consequence thereof, and also, so that the said Cobre Grande Copper Company shall not be called upon to pay any note or obligation which said Orne, or his transferees or transferee may hold against said company until after this option shall have been complied with.

Sixth. It is expressly stipulated and agreed that this instrument is an option to purchase stock, and shall not in any event be binding upon the party of the second part as a contract requiring him, the said second party, to buy the hereinbefore mentioned shares of stock of the Cobre Grande Copper Company.

Seventh. It is understood and agreed between the parties hereto that time is the essence of this contract, and of each clause and article herein.

In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

E. B. GAGE, as Trustee,
By J. D. DORT, Att'y in Fact.
L. H. CHALMERS, Agent.

Witness:
W. H. DOWE.

215 STATE OF NEW YORK, } ss.:
County of New York, }

On this second day of June, 1900, personally appeared before me J. D. Dort and L. H. Chalmers, both to me personally known and known to me to be the parties who executed the foregoing instrument. The said Dort duly acknowledged to me that he had full power and authority to execute the above and foregoing instrument on behalf of E. B. Gage, trustee, party of the first part thereto, and L. H. Chalmers acknowledged that he duly executed the same as agent, and had full power and authority so to do.

In witness whereof, I have hereunto affixed my official signature this the second day of June, 1900.

ALPHEUS S. FRANK,
[SEAL.] Notary Public (94), New York County.

I hereby consent to the terms of the foregoing contract.

J. H. COSTELLO.

Witness:
W. H. DOWE.

DEFENDANTS' EXHIBIT "E," TELEGRAMS.

PHŒNIX, ARIZONA, May 31st, 1900.

J. D. Dort, Waldorf-Astoria:

I hereby authorize you in my name as trustee to extend Chalmers option or give new option to others for sixty days to purchase majority stock Cobre Grande Copper Company at two-fifty per share, fifty thousand cash to be payment for twenty thousand shares represented by trustee's certificates and to be delivered only on terms of Orne option. Cash payment to be distributed to stockholders pro rata (except Costello) after buying up dissenting stock. Provide
216 for expenses Cobre Grande during option and take care Orne notes. You must get Costello's consent, include his stock and not share in distribution. Above are general lines which you are authorized to modify in your discretion if necessity arises.

E. B. GAGE.

NEW YORK, June 1, 1900.

E. B. Gage, Phœnix, Arizona:

Contract has been signed, approved by us, mailed today. You are authorized to use money, provided stockholders agreed extension or ratify it.

DOWE & HARTRIDGE.
L. H. CHALMERS.
J. D. DORT.

NEW YORK CITY, June 1, 1900.

J. D. Dort, agent; E. B. Gage, trustee.

DEAR SIRS: You are hereby authorized to place my thirty-one thousand and nine hundred (31,900) shares of Cobre Grande Copper Company stock, now in the hands of E. B. Gage, trustee, in the Gage-Chalmers optional agreement now being considered, the terms of said agreement being known to me.

J. H. COSTELLO.

PHŒNIX, ARIZONA, June 2nd, 1900.

William H. Dowe, Esq., 35 Nassau street, New York city.

DEAR SIR: This is to inform you that Mr. E. B. Gage, trustee, has this day granted me the option to purchase the majority of the stock of the Cobre Grande Copper Company. This option runs to
217 the first day of August, 1900. Said option was given me by Mr. Gage at my request, I acting as agent for you in the mat-

ter, it being the understanding between us that you, or your assigns, shall have the first opportunity of taking up this option, or of furnishing parties to take it up. If you should fail to either take it yourself, or furnish parties to take it up, I then reserve the right to exercise it myself.

Yours truly, L. H. CHALMERS.

NEW YORK, June 2nd, 1900.

L. H. Chalmers, Esq., counsellor-at-law, Phœnix, Arizona.

MY DEAR MR. CHALMERS: I have received your favor of this date in which you declare to me that the option agreement to purchase certain shares of the Cobre Grande Copper Company stock being a majority thereof, which is signed by you as agent, was so signed by you as the agent for myself or my assigns.

Agreeable to your request I hereby inform you that the parties for whom I am acting and in whose interest I act as trustee in the matter of this option agreement are as follows:

John H. Costello, Buffalo, N. Y.
Axel W. Hallenborg, New York.
Henry H. Adams, New York.
James Shirley, New York.
Senator William J. Deboe, Marion, Ky.

Very truly yours,

WILLIAM H. DOWE.

218 DEFENDANTS' EXHIBIT POOLING CONTRACT UNEXECUTED.

Dated November — 1900, between E. B. Gage and certain stockholders of the Cobre Grande Copper Company, whose names are omitted. Recites that Gage is the holder of — shares of stock of the Cobre Grande Copper Company, and that Costello and Hallenborg are desirous of taking an option for the purchase of said stock at $2.50 a share; refers to the litigation between Cobre Grande Copper Company and W. C. Greene, the Greene Consolidated Copper Company, and the Cananea Consolidated Copper Company; describes the mining properties in Sonora; recites that Gage gives Costello and Hallenborg an option to buy stock in the Cobre Grande Copper Company at $2.50 a share, the amount and date of said purchase to be left blank. Said Hallenborg & Costello so purchase outright 10% of the holdings of certain shares of stock, owned by Adamson and other parties named therein, payable 90 days after the Cobre Grande Copper Company should acquire possession of its properties in Sonora. Further provides for the exchange of stock between the holders of stock of the Cobre Grande Copper Company and the holders of stock of the Sonora Copper Company; also for the payment of about $6,000 of indebtedness of the Cobre Grande Copper Company in items therein set forth, and the payment of legal expenses and attorneys' fees due by the company, and its running expenses.

This contract not signed nor blanks filled in.

219 (Same Title.)

Findings.

On this, the 12th day of May, 1902, this cause came on regularly for trial.

Plaintiffs appeared by their attorneys, Messrs. Hawkins & Wilson and Atwater & Cruikshank.

Defendants Cobre Grande Copper Company, E. B. Gage, W. M. Adamson, J. Henry Wood, Con O'Keefe and the Phœnix national bank appeared by their counsel, Messrs. Herndon & Norris, L. H. Chalmers and Ben Goodrich.

The defendant Cobre Grande Copper Company also appeared by its attorneys Barnes & Martin and E. S. Ives.

Defendant J. H. Costello appeared by his attorney J. M. Jamison.

Defendants Greene, Greene Consolidated Copper Company and the Cananea Consolidated Copper Company appeared by Barnes & Martin, E. S. Ives and Norton Chase.

Defendant Mitchell appeared by R. E. Morrison.

All parties announced ready for trial.

A jury having been waived, the cause was tried by the court.

Evidence was introduced by the respective parties, both oral and documentary.

The cause was argued by counsel and submitted to the court for its decision and judgment.

Thereupon the court took the same under advisement, and having duly considered the evidence and the law applicable to the same, and having been fully advised in the premises, after due deliberation, on this September 18th, 1902, makes and files its decision and judgment in writing, as follows:

I.

The court finds that the defendant Cobre Grande Copper Company is now and was at the time of the commencement of
220 this action, a corporation organized under the laws of the Territory of Arizona having its principal office at Phœnix, in said Territory. That its capital stock was $500,000, divided into 200,000 shares of $2.50 each.

That the defendant E. B. Gage was a director and president of the Cobre Grande Copper Company from and prior to December 12th, 1900, up to April 3rd, 1901, at which time he resigned as such director and president and his resignation was accepted, and that since that time he has not been connected with said corporation.

That defendants Adamson, Costello, Wood and O'Keefe were directors of said Cobre Grande Copper Company from and prior to December 12th, 1900, until April 3rd, 1901, at which time they resigned as directors and their successors were elected and qualified

and that they have had no connection with said company since that date.

That defendant Wood was secretary of said Cobre Grande Copper Company from and prior to December 12th, 1900, up to about April, 1901, at which time he resigned as such secretary and has had no connection with said company since that date.

That the defendant Phœnix National Bank, of Phœnix, Arizona Territory, was, at the time this action was commenced, and is now, a corporation organized under the laws of the United States and having its principal place of business in said Territory.

That the defendant Cananea Consolidated Copper Company is a corporation organized under the laws of the State of Sonora, Republic of Mexico.

That the Greene Consolidated Copper Company is a corporation organized under the laws of the State of West Virginia, and that defendant Greene is now and has been since prior to January 1st, 1900, the president of said last-named corporation and a stockholder therein.

II.

That plaintiff Hallenborg is now and was at the time this action was commenced, a stockholder in said Cobre Grande
221 Copper Company, and owns 8,000 shares of the stock of said company, and has since June 15th, 1900.

That plaintiff Addicks is now and was at the time this action was commenced, owner and holder of 5,000 shares of the stock of the said Cobre Grande Copper Company.

That plaintiff Hallenborg was at the time this action was commenced and is now the owner and holder of the promissory notes set out in paragraph two of plaintiff's complaint, and that he is a resident of the city and county and State of New York.

That plaintiff Addicks is a resident of the State of Delaware.

That defendants Gage and Adamson are residents of Yavapai county, Arizona Territory. Defendant Wood, of Maricopa county, Arizona. Defendants Greene, Mitchell and O'Keefe, of Cochise county, Arizona.

III.

That since prior to January 1st, 1900, the Cobre Grande Copper Company had been engaged in a series of lawsuits with the defendants Mitchell and Greene and their associates, in the state of Sonora, Republic of Mexico, in the third judicial district of the Territory of Arizona in and for the county of Maricopa, and in the district court of the 34th judicial district of the State of Texas in El Paso county, Texas, and in the State of New York as hereinafter specifically set forth.

That there was filed and instituted in the district court of the third judicial district of the Territory of Arizona in and for Maricopa county on the 25th day of November, 1899, a certain suit

wherein the Cobre Grande Copper Company was plaintiff and William C. Greene, George Mitchell and the Phœnix National Bank were defendants, No .3437 on the docket of said court. In said suit the Cobre Grande Copper Company alleged, among other things, in substance, all the facts set forth in paragraph three of plaintiffs' original complaint on file in this action, and prayed that said
222 Greene be required to account to the said Cobre Grande Copper Company for the proceeds of the products of said mines and mining claims mentioned and described in plaintiffs' complaint, together with the supplies, material and property of said Cobre Grande Copper Company alleged to have been taken and appropriated by him. That answers thereto were filed by the defendants in said action and issues joined thereon.

That said cause came on for trial on the issues involved and the cause was finally submitted to said court for decision and judgment.

That afterwards, on April 15th, 1901, said court having fully considered the cause and the allegations and the evidence, found the issues for the defendants and entered judgment dismissing plaintiff's complaint.

The court further finds that said judgment so rendered by said court has not been appealed from nor taken up to any appellate court of the Territory of Arizona by any writ of error or other proceedings.

The court further finds that at the time the said judgment and decree was made and entered in Maricopa county and for a long time prior thereto, the plaintiffs herein were stockholders in said Cobre Grande Copper Company.

IV.

The court further finds that about the month of November 1898, and prior thereto, defendant Greene owned certain property in Sonora, Mexico, and had options to purchase other properties there, being same mentioned in plaintiffs' complaint in this action.

That in said month of November, 1898, said Greene executed an option on the property then owned by him in Sonora and the other property for which he had contracts to purchase, to defendant Mitchell.

That said option provided that said Mitchell should pay in cash at the execution of said contract $12,500.00 and $237,500 as follows: $37,500.00 to be paid on or before November 26th, 1899; $100,000.00 on or before November 26th, 1901.

223 That thereafter about the month of April, 1899, said Greene and Mitchell with the assistance of other parties, organized the Cobre Grande Copper Company under the laws of Arizona.

That 199,995 shares of the stock of the said Cobre Grande Copper Company were turned over to the defendant Mitchell in consideration of his option from Greene, which said option between Greene and Mitchell was assigned to the Cobre Grande Copper Company subject to the rights of said Greene therein.

That the Cobre Grande Copper Company thereupon entered upon and into said property and began to operate the same, and was in possession in September, 1899.

That on or about the month of October, 1899, controversies arose between the Cobre Grande Copper Company and the defendant Greene over said option and the right of possession to said mining property, and that on or about that time said Greene entered into possession of said property.

That thereupon the Cobre Grande Copper Company instituted a suit in the courts of Sonora, Republic of Mexico, to gain possession of said property, and also instituted the suit in the district court of Maricopa county, Arizona, No. 3437 above referred to, to restrain the delivery to said Greene of the deeds which were put in escrow under said contract with Mitchell and thereafter assigned to the Cobre Grande Copper Company.

That under the last named suit a temporary injunction was granted, restraining the Phœnix national bank as escrow agent of the parties, from delivering the said escrow papers and also restraining defendant Greene from demanding or receiving the same from said bank.

V.

That while said litigation was in progress, the stockholders of the Cobre Grand- Copper Company, or a majority thereof, com-
224 prising stockholders to the extent of 115,049 shares or thereabouts, entered into a pooling arrangement or arrangement whereby all of their stock, to wit, 115,049 shares, was delivered to the defendant E. B. Gage with power to vote the same at all meetings of the stockholders.

That after said stock was pooled and while said pooling contract was in force, the stockholders therein represented granted to defendant E. B. Gage, who held said stock in said pool, the right to dispose of and sell said stock at his discretion.

That on January 5th, 1900, the said Gage as trustee, made and entered into a contract with one Benjamin Orne for the sale of said stock at $2.50 per share, a copy of which said contract is attached to defendants' first amended answer herein marked Exhibit 2 and made a part thereof.

VII.

That the said Orne failed to carry out the terms of said option on his part and failed to purchase said stock.

That on March 30th, 1900, the said Gage, trustee for stock, with power to sell and dispose of the same entered into an agreement with L. H. Chalmers, agent, for the sale of 101,000 shares of the Cobre Grande Copper Company with stock at the price of $2.50 per share, a copy of which said contract is attached to defendants' first amended answer marked Exhibit 3 and made a part thereof.

That in said contract the said Chalmers was acting as agent for

Samuel Untermeyer of the city of New York, or in case the said Samuel Untermeyer refused to carry out the terms of said option, then such responsible party or parties that might be named by one James Shirley.

That said contract with said Chalmers lapsed on account of his failure and the failure of those whom he represented, to purchase said stock.

That on June 2nd, 1900, said Gage on behalf of said
225 stockholders, entered into a second agreement with the said Chalmers as agent, for the sale of 101,000 shares of the capital stock of the Cobre Grande Copper Company at the price of $250,000.00 upon the terms and conditions named in said option, a copy of which said option is attached to defendants' first amended answer and marked Exhibit 4 and made a part thereof. And on the same day said Chalmers made written declaration that he was acting as the agent for one William H. Dowe of the city of New York, and his representatives; and on the same day said Dowe declared in writing that he was acting for and representing John H. Costello, Axel W. Hallenborg, plaintiff in this action, Henry H. Adams, James Shirley and Senator William F. DeBoe.

That in consideration for said option said parties purchased, to wit, about 16,000 shares of the stock of the Cobre Grande Copper Company and paid therefor $2.50 per share.

That said contract was not complied with on the part of said Chalmers and those whom he represented as agent, but was forfeited and permitted to lapse by the parties for whom said Chalmers was acting as agent, among whom was the said Hallenborg.

VIII.

That afterwards said Gage undertook to negotiate another contract or option for the sale of said stock.

That plaintiff Hallenborg and John H. Costello opened negotiations with said Gage and undertook to procure an option from him for the purchase of said stock so held by him as trustee, at $2.50 per share. That Grant R. Bennett, an attorney of the city of New York, came to Phœnix, Arizona, with a power of attorney from said Hallenborg and personally opened negotiations in behalf of said Hallenborg to procure an option for the purchase of the stock then held in pool by the said Gage.

That defendant Costello was personally present during this time, which occurred about the month of October, 1900.

226 That various contracts were drawn up and submitted for consideration of the parties trying to effect a deal, and that the form of contract which was drawn agreeable to and in conformity with the views and agreements expressed by plaintiff through his said attorney, Grant R. Bennett, is attached to defendants' second amended answer, marked Exhibit 5, and made a part thereof.

That the same was consented to by plaintiff Hallenborg and his

attorney, Grant R. Bennett, but that objections were raised thereto by said Costello, and that said Hallenborg being unable to or not desiring to enter into said contract alone and without said Costello, the same was not, for that reason, signed.

That various other contracts were suggested and drawn of like tenor and import, all of which were consented to by the said Hallenborg and said Cobre Grande Copper Company, but were not satisfactory to said Costello, and they in turn were rejected and not signed for that reason.

That these negotiations were kept up between plaintiff Hallenborg and Costello, on the one part, and the defendant Gage, as trustee as aforesaid, on the other part, until about the first week of December, 1900, and nothing resulted therefrom.

That thereupon said Gage opened negotiations with the said Greene to sell him the stock.

That said Green offered to purchase the stock upon better terms than anybody else had ever offered.

That said Gage consulted the directors and a large majority of the stockholders of the Cobre Grande Copper Company and they urged him to enter into a contract with Greene for the sale of the stock. That said stock represented by said Gage (participating in said contract) comprised the entire stock of the Cobre Grande Copper Company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties.

Thereupon said Gage took the matter up with said Greene and did, on the 12th day of December, 1900, enter into the contract of that date mentioned in plaintiff's original complaint filed in this action.

227 That after said contract was made, a meeting of the board of directors and a meeting of the stockholders of the Cobre Grande Copper Company was held and said contract was ratified in its entirety by said directors and by a majority vote of the stockholders at said meeting, said Hallenborg being present at the stockholders' meeting and protesting against the ratification of said contract.

That immediately upon the execution of said contract said Greene paid fifty cents per share for each of the shares represented in the pool aforesaid, including fifty cents for each share then held and owned by plaintiff Hallenborg.

That afterward said Greene complied with his contract and paid up the full purchase price for the said stock, as agreed upon in the contract of December 12th, and the said stock was delivered to him and the Greene Consolidated Copper Company in accordance with said contract of December 12th, 1900.

That said stockholders accepted the money so paid to the said Gage and ratified said contract except plaintiff Hallenborg, who returned the money sent to him, and declined to be bound by said contract.

The court further finds that the contract of December 12th, 1900, was entered into by E. B. Gage in good faith with the full knowledge and consent of the directors of the Cobre Grande Copper Company and upon the advice of counsel of the Cobre Grande Copper Company that the company could not successfully maintain its suit, No. 3467, and with the belief on the part of said Gage that said contract was to the best interests of said company and its stockholders.

The court further finds that no agreement was made between Gage or any other persons whereby the directors Adamson, Wood, O'Keefe, or any of them, were to derive or did derive any benefit or gain whatsoever, except such benefits as they derived from the sale of their stock.

228

IX.

That the suits mentioned in plaintiff's complaint as pending in the State of New York are still pending.

That all other suits mentioned in plaintiff's complaint were dismissed or otherwise disposed of by final judgment prior to this action.

That the $25,000 mentioned in the contract of December 12th, 1900, was for the purpose of taking up and discharging certain outstanding notes due and owing by the Cobre Grande Copper Company to its creditors.

That the $30,000 cash mentioned in said contract of December 12th, 1900, was for the purpose and it was intended by the parties to be turned into the treasury of the Cobre Grande Copper Company to pay its debts.

That the 3,000 shares of the capital stock of the Greene Consolidated Copper Company mentioned in said contract, or the $30,000 which Greene had a right to pay in lieu thereof, together with the $30,000 last above mentioned, was intended by the parties to be paid into the treasury of the Cobre Grande Copper Company for the purpose of paying said company's indebtedness outside of the $25,000 in this finding last above mentioned, a portion of which indebtedness said Hallenborg claims in this action.

That the 5,000 shares of stock of the Greene Consolidated Copper Company mentioned in said contract of December 12th, 1900, agreed to be paid to said Gage was intended by all the parties as compensation to said Gage for services rendered by said Gage as president of the said Cobre Grande Copper Company and as compensation to him for the time, labor, trouble and attention given to said company's business and for money advanced to and for said company and expenses paid in attending to the affairs of said company and in connection therewith.

That the 5,000 shares of stock of the Greene Consolidated Copper Company mentioned in said contract of December 12th, 1900, as agreed to be paid to L. H. Chalmers, Baker & Bennett and Herndon & Norris, attorneys for the Cobre Grande Company, was in-
229 tended to be paid as compensation for their services rendered to said company in various litigations.

That the $25,000 intended for the purpose of taking up certain outstanding notes due to the creditors of the Cobre Grande Copper Company was paid by said Greene and used in paying said creditors.

That the $30,000 first mentioned in this paragraph was paid by said Greene to said Gage, and by him paid into the treasury of the Cobre Grande Copper Company.

That the 3,000 shares of the capital stock of the Greene Consolidated Copper Company mentioned in this paragraph, in lieu of which the said Greene had the option of paying $30,000, was paid in cash by said Greene to said Gage, and by him paid into the treasury of the Cobre Grande Copper Company.

That the 5,000 shares of stock which was intended as compensation to defendant Gage, was paid in cash, to wit, the sum of $50,000.

That the 5,000 shares of stock of the Greene Consolidated Copper Company mentioned in said contract of December 12th, 1900, as being intended to be paid to L. H. Chalmers, Baker & Bennett and Herndon & Norris, $50,000, was paid in cash in lieu thereof, and the same was distributed among said attorneys, and the proof tends to show that their services were reasonably worth said amount and there was no evidence to the contrary.

That the note of J. H. Costello mentioned in the contract of December 12th, 1900, was conditioned upon the Cobre Grande Copper Company obtaining possession of its property in Mexico; said note was not to be paid until ninety days after such recovery of possession. That the said note was turned over to said Costello as provided by the terms of said contract.

X.

The court further finds that the only property now in the possession of the Cobre Grande Copper Company, within the jurisdiction of this court, is a certain sum of money held by the treasurer of said company which was paid to him as part of the proceeds of the agreement of December 12th, 1900.

230 XI.

The court further finds that the temporary restraining order granted in this action enjoining defendants from carrying out the terms and provisions of the contract of December 12th, 1900, and dismissing any and all of the actions then pending in behalf of the Cobre Grande and enjoining defendant Phœnix National Bank from delivering up any of the papers and documents held by it in escrow evidencing the title held by the Cobre Grande Copper Company in and to the mining property described in the complaint, was modified, and that part of it enjoining the Phœnix National Bank was dissolved upon the ground that the district court in and for Maricopa county had rendered its decision in the suit of the Cobre Grande Copper Company against Greene and others adversely to said Cobre Grande Copper Company, and that as a part of the judg-

ment of said court the Phœnix National Bank was commanded to deliver up said papers and documents to said defendant Greene, and that as this case now stands, there is nothing before the court except an application for the appointment of a receiver.

As conclusions of law, from the foregoing findings, the court finds and decides:

That plaintiff is not entitled to any relief whatever in this action.

That the application for the appointment of a receiver herein should be denied.

That the complaint of plaintiffs should be dismissed and that the defendants should recover their costs, and the court hereby orders that judgment and decree be entered accordingly.

Done in open court this September 18th, 1902.

RICHARD E. SLOAN,
District Judge.

(Endorsed:) Filed September 18th, 1902.—J. M. Watts, clerk.

231 To which said findings and each and all of them the plaintiffs then and there excepted and asked that their exceptions be noted of record, which is accordingly done, and thereupon, on said 18th day of September, A. D. 1902, the court rendered its judgment as follows:

I hereby certify that the foregoing is tendered to me by counsel for the plaintiffs and the defendants, to which they had agreed as being correct as the statement of facts containing all the evidence in the cause and the bill of exceptions, containing all the evidence in said cause and all of the exceptions taken and noted on behalf of plaintiffs during the trial of said cause. And I further certify that the same contain all the evidence in said cause and the exceptions noted and allowed on behalf of the plaintiffs, as well as the findings, judgment, motion for new trial and exceptions noted and allowed on behalf of plaintiffs relating thereto. And I further certify that the same are correct as a bill of exceptions and statement of facts and the same are hereby settled, allowed and approved and made part of the record in said cause during the term of court at which judgment was rendered, to wit, this 28th day of October, 1902.

(Signed) RICHARD E. SLOAN, Judge.

(Endorsed:) Filed at 4 o'clock p. m., Oct. 28th, 1902.—J. M. Watts, clerk.

And be it further remembered, that thereafter, to-wit, on the 28th day of October, 1902, and during the said June term, 1902, of said court, being the term of said court at which judgment was rendered, said motion for a new trial came on for hearing before said court and the same was by said court denied and overruled; to which said ruling of the court in denying and overruling said motion for

a new trial said plaintiffs duly excepted and asked that their said exception be noted of record, which is accordingly done.

232 And thereupon, on said 28th day of October, 1902, plaintiffs by their counsel tendered the foregoing to the defendants and their counsel, as the statement of facts and bill of exceptions in said cause.

And said counsel having examined the same, hereby certify the same to be correct and with counsel for the plaintiffs present the same to the court to be settled, allowed and approved and made a part of the record in said cause.

HAWKINS & WILSON,
Attorneys for the Plaintiffs.
BARNES & MARTIN,
BEN. GOODRICH,
HERNDON & NORRIS,
ROBT. E. MORRISON,
Attorneys for the Defendants.

(Same Title.)

This cause came on regularly for trial on the 12th day of May, 1902: Plaintiffs appeared by their attorneys, Messrs. Hawkins & Wilson and Atwater & Cruikshank; defendants, Cobre Grande Copper Company, E. B. Gage, W. M. Adamson and J. Henry Wood and Con O'Keefe and The Phœnix National Bank, appeared by their counsel, Messrs. Herndon & Norris, L. H. Chalmers and Ben Goodrich. The defendant Cobre Grande Copper Company also appeared by its attorneys, Barnes & Martin and E. S. Ives, Esq. Defendant J. H. Costello appeared by his attorney, J. M. Jamison. Defendants Greene, the Greene Consolidated Copper Company and the Cananea Consolidated Copper Company, appeared by Barnes & Martin and E. S. Ives and Norton Chase, Esqs. Defendant Mitchell appeared by R. E. Morrison, Esq.

All parties announced ready for trial: A trial by jury was waived and the cause was tried by the court. Evidence was intro-

233 duced by the respective parties, both oral and documentary, and the testimony was closed; the cause was argued by counsel and submitted to the court for its decision and judgment. The court thereupon took the same under advisement, and having duly considered the evidence and the law applicable to the same, and being fully advised in the premises, after due deliberation, on this September 18th, 1902, makes and files its findings and decision in writing and orders that judgment be entered in accordance therewith.

Wherefore, by reason of the law and the findings aforesaid, it is ordered, adjudged and decreed, that plaintiffs are not entitled to any relief whatever in this action. That they take nothing by their said complaint and that their application for the appointment of a receiver be and the same hereby is denied, and that the injunction

and restraining order heretofore granted herein be and is dissolved.

It is further ordered that the defendants recover of the plaintiffs their costs in this behalf incurred or expended, taxed at the sum of $—.

Done in open court this 18th day of September, 1902.

(Signed) RICHARD E. SLOAN,
District Judge.

(Endorsed:) Filed Sept. 18th, 1902. J. M. Watts.

To which said judgment the plaintiffs then and there excepted and asked that their exceptions be duly noted of record, which is accordingly done, and thereupon, and within five days after rendering of said findings and judgment, to wit, on the 20th day of September, 1902, plaintiffs filed a motion in said court for a new trial, which is in words and figures following, to wit:

234 (Same Title.)

Motion for New Trial.

Come now the plaintiffs in the above-entitled cause and move the court for a new trial on the following grounds, to wit:

I.

That the court erred on the trial of said cause in admitting evidence in behalf of the defendants, duly objected to by the plaintiffs.

II.

That the court erred in rejecting evidence offered by the plaintiffs and objected to by the defendants.

III.

Upon the ground that the evidence does not sustain the decision and judgment of the court.

IV.

That the judgment of the court is contrary to law and equity.

V.

The court erred in not finding and adjudging that the agreement of December twelfth, 1900, and all acts of defendants in pursuance thereof, were in violation of plaintiffs' rights and entitled them to the relief asked for in their complaint.

VI.

The court erred in not ordering and adjudging a decree from the evidence in the case, that the said agreement of December twelfth,

1900, was and is fraudulent, illegal and void as to the said plaintiff and the defendants Cobre Grande Copper Company, for the reason that the evidence clearly established and showed that neither the said Hallenborg nor said Addicks ever consented to the agreement of December twelfth, 1900, or the proceedings thereunder, and that they were minority stockholders of said Cobre Grande Copper Company, and their rights had not been protected under said agreement, and, when same was subsequently attempted to be ratified at a meeting of the stockholders of the said company said Hallenborg protested against the same.

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VII.

The court erred in not holding and adjudging, as a matter of law and equity, that the said agreement of December twelfth, 1900, constituted a grievous wrong against the plaintiffs and the other minority stockholders and creditors; was and is fraudulent as to them and in not entering judgment for the plaintiffs as prayed, for the reason that the evidence showed that the plaintiffs are now, and have been prior to the commencement of this action, stockholders of the defendant Cobre Grande Copper Company; the plaintiff Hallenborg holding 8,617.9 shares and the plaintiff Addicks 5,000 shares of the capital stock of said corporation. The plaintiff Hallenborg is further shown to be a creditor to said corporation in the amount of $50,405.25, besides interest on eight promissory notes made by said Cobre Grande Copper Company at various dates, and are overdue and unpaid, and no provision was made whatever in said contract for the protection of plaintiffs or any minority stockholders, or any other creditors.

VIII.

The court further erred in rendering judgment for the defendant for the reason that prior to the thirteenth day of October, 1899, the evidence shows that the Cobre Grande Copper Company had been in possession of certain valuable mining property situate in the Cananea mountains, State of Sonora, Republic of Mexico; under and by virtue of certain contracts, agreements and deeds made by defendants William C. Greene and George Mitchell, or to which they were parties, and that it was further in possession of the smelter and other property connected with the said mines and mining property, the whole being of great value, namely, of the value of upwards of one million dollars, and that on or about the thirteenth day of October, 1899, the said William C. Greene obtained possession of said property theretofore in possession of the Cobre Grande Copper Company, and the same subsequently came into possession of the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company, or one of them, and that thereupon the defendant Cobre Grande Copper Company became engaged in a series of litigations with the defendants Greene, Mitchell, Greene Consolidated Copper Company and the Cananea Consolidated

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Copper Company arising out of the claims of the Cobre Grande Copper Company to the said property and the repossession thereof and out of its claims to the copper matte product of said mine; one of which said litigations was an action brought by the Cobre Grande Copper Company against the said Greene and others in the third district court, county of Maricopa and Territory of Arizona, to prevent the delivery to the said Greene, Mitchell and others, of certain deeds to the said mining property and otherwise involving the claim and right of the said Cobre Grande Copper Company to the said property. Said litigations were the result of meritorious efforts on the part of said Cobre Grande Copper Company to recover and defend its said property and were duly authorized and were substantial and *bona fide*, involving a large expense to the said Cobre Grande Copper Company and were in various stages of progress at the time of the said agreement of December twelfth, 1900, hereinbefore mentioned and referred to; and that on December twelfth, or thereabouts, an agreement in writing was made by William C. Greene and the Greene Consolidated Copper Company, by William C. Greene, its president, on the one part, and said E. B. Gage, of the Cobre Grande Copper Company, by said Gage, its president, of the other part, whereby it was provided that the said William C. Greene and the Greene Consolidated
237 Copper Company should become the purchasers of 115,049 shares of the capital stock of the Cobre Grande Copper Company, then held by said Gage as trustee of certain stockholders; that Gage should further receive various large sums of money for himself and for various parties; that the defendant John H. Costello's note for $23,000 held by said Cobre Grande Copper Company, should be surrendered to him, the said Costello; that all said suits and proceedings should be dismissed; that certain copper matte in said litigation in New York, should be delivered to the defendant Greene and the Greene Consolidated Copper Company. At that time the directors of the Cobre Grande Copper Company were the defendants, Gage, Adamson, Costello, Wood and O'Keefe, and their resignations were provided for by said agreement, which was ratified individually by said Costello and consequently by said board of directors. Said agreement was substantially carried out as far as possible, the said directors resigning and the said Greene and others under his control were elected in their places; the said actions were dismissed, or the prosecution thereof terminated, and the control and management of the Cobre Grande Copper Company immediately fell into the hands of said Greene and the Greene consolidated Copper Company; that the said note for $23,000 was surrendered to the said director, the defendant Costello.

That the plaintiff Hallenborg immediately protested against such proceedings and took action to defeat the same and protect his interests, the creditors and stockholders, and that neither the said Addicks nor the said Hallenborg ever consented to such agreement of December twelfth, 1900, or the proceedings thereunder; the same

was subsequently attempted to be ratified at a meeting of the stockholders of said company, or a majority thereof, notwithstanding the protests of the said Hallenborg made at that time; and that in pursuance of said agreement and as a part of the scheme thereof, the said Greene was appointed to represent the Cobre Grande
238 Copper Company as its agent in said suits, actions and proceedings, or some of them; and in further pursuance thereof a certain appeal then pending in an action in Texas between the Cobre Grande Copper Company, as plaintiff, and certain defendants, was dismissed or withdrawn for the appellant in that case; and further, the said action in the third district court of Arizona between the Cobre Grande Copper Company against said Greene and others, which had theretofore been tried and submitted for decision to Mr. Chief Justice Street, of said Territory, was withdrawn from submission; and thereafter on April fifteenth, 1901, in further pursuance of said agreement, the judgment in said action was caused to be entered dismissing the same; that the said proceedings of dismissal of the appeal in Texas and dismissal of the action in the third district court of the Territory of Arizona were, as to these plaintiffs, collusive and without any binding force or effect. And plaintiffs say that the judgment and decree of the court in this case should be in their favor, for the reason that the evidence in the case, as above stated, clearly shows and demonstrates that the agreement of December twelfth, 1900, and the whole thereof, was and is illegal and fraudulent as to the plaintiffs and as to all other persons, creditors and stockholders of the Cobre Grande Copper Company similarly situated, and that all of the acts done thereunder in pursuance thereof were likewise collusive and fraudulent as to the plaintiffs and said creditors and stockholders, and that the interests of the Cobre Grande Copper Company and of the plaintiffs and of other persons similarly situated required that the court should appoint a receiver of the property of the Cobre Grande Copper Company to protect and defend its property, claims and interests.

IX.

The court erred in entering judgment for the defendants and in deciding that the testimony did not establish actual fraud upon the part of Gage, the president of the company, and in holding that it was not nece-sary to decide whether or not the acceptance, on
239 the part of Gage, of a large sum of money from Greene for his personal use, made out a case of constructive fraud against said Gage, for the reason that it is shown under contract of December twelfth, 1900, that the said Gage and the other directors and the majority stockholders of the Cobre Grande Copper Company bartered away for money the offices of the company; gave its control to its enemies, stripped it of all its property, and drove it out of business, and the creditors and minority stockholders, including these plaintiffs, were left absolutely without prospect of recovering

anything for their claims or the future value of the stock. The evidence clearly shows that said Gage and his associates left the corporation, defendant Cobre Grande Copper Company, practically dead, and the evidence in the case establishes a case of fraud both actual and constructive against the officers, agents and representatives of the Cobre Grande Copper Company.

X.

The decision of the court is contrary to law and the evidence, and to equity, for the reason that the evidence shows that the court should have rendered judgment in favor of the plaintiffs and appointed a receiver in the present action, for the reason that it is shown by the evidence that after entering into the agreement of December twelfth, 1900, by Gage, Greene and their respective companies, and the consummation thereof, that they had wrecked the defendant corporation, Cobre Grande Copper Company, and for the protection of these plaintiffs and under the pleadings and proof in the case it was necessary for such receiver to be appointed so that he could take charge of all contracts, stocks, bonds, property, franchises, things in action and effects of every kind and nature, with full power and direction and authority to seize, collect, receive, sue for, prosecute, and recover all property, debts, demands, claims, rights in action and other assets of or belonging to the de-
240 fendant Cobre Grande Copper Company or recoverable by it, and generally to do any and all other things with the usual power and duties of receivers according to law and the practice of this court.

XI.

The court further erred in rendering judgment for the defendants for the reason that it is shown in the evidence that E. B. Gage, John H. Costello, W. M. Adamson, Con O'Keefe and J. Henry Wood, the directors of said company, or some of them, had received for their own use large sums of money and other things of value belonging to the said Cobre Grande Copper Company, and the complaint herein asks for an accounting and they should have been required under a decree of this court to account to a receiver hereof for all and singular the property, assets and effects of the Cobre Grande Copper Company, which they or any of them, received or disposed of as directors and officers of said company, or otherwise, and they should have been, under the evidence herein, required to account accordingly.

XII.

The decision of the court is contrary to law and equity and should have been in favor of the plaintiffs, and the court having jurisdiction of all parties should have appointed a receiver, granted the injunction and the relief prayed for, and found the issues in

favor of the plaintiffs, or granted such general relief as plaintiffs were entitled to under the evidence in the case.

HAWKINS & WILSON,
Attorneys for Plaintiffs.

Filed Sept. 20th, 1902.
J. M. WATTS, Clerk.

241 Appeal Bond.

(Title and Venue.)

Whereas, in the above numbered and entitled action pending in the district court of Yavapai county, Arizona, at a regular term of said court, to wit:

On the 18th day of September, A. D. 1902, the said defendants, Cobre Grande Copper Company, E. B. Gage, William M. Adamson, William C. Greene, George Mitchell, Phœnix National Bank of Phœnix, Arizona Territory, Cananea Consolidated Copper Company and Greene Consolidated Copper Company, J. H. Costello, J. Henry Wood and Con O'Keefe, recovered judgment against said plaintiffs, Axel W. Hallenborg and J. Edward Addicks, denying the prayer of plaintiffs' complaint, and for all costs of the suit taxed at thirty-six and 60/100 dollars; and

Whereas, on October 28th, 1902, the said court overruled said plaintiffs' motion for a new trial, and the said plaintiffs, Axel W. Hallenborg and J. Edward Addicks, have taken an appeal to our supreme court from said judgment and order overruling said motion for a new trial and from the whole thereof.

Now, therefore, we, Axel W. Hallenborg and J. Edward Addicks, as principal and Fidelity and Deposit Company of Maryland, sureties, acknowledging ourselves bound to pay the Cobre Grande Copper Company, E. B. Gage, William M. Adamson, William C. Greene, George Mitchell, Phœnix National Bank of Phœnix, Arizona Territory, Cananea Consolidated Copper Company, Greene Consolidated Copper Company, J. H. Costello, J. Henry Wood and Con O'Keefe, defendants-appellees, the sum of one thousand ($1,000) dollars, being double the probable amount of cost of suit both of appellate court and the court below, as fixed by the clerk of safd court.

Conditioned that said Axel W. Hallenborg and J. Edward Addicks, appellants, shall prosecute their appeal with effect, and
242 shall pay all costs which have accrued in the court below, or which may accrue in the appellate court.

Witness our hands this fifth day of November, A. D. 1902.

(Signed) AXEL W. HALLENBORG,
Per ATWATER & CRUIKSHANK, His Att'ys.
(Signed) J. EDWARD ADDICKS,
Per HAWKINS & WILSON, His Att'ys.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
[SEAL.] Per HENRY B. PLATT, Vice-Pres.
Attest: JAMES R. KINGSLEY,
Attorney in Fact.

STATE OF NEW YORK, }
County of New York, } ss:

Henry B. Platt, being duly sworn, deposes and says that he is one of the vice-presidents of the Fidelity and Deposit Company of Maryland; that the said company had complied with all the laws of the Territory of Arizona, relative to the furnishing of bonds, undertakings, etc.; that he is well acquainted with the assets of the said company; that the said company is worth double the amount for which it has become surety upon the foregoing obligation, over and above its just debts and liabilities, in property, not exempt from execution.

(Signed) HENRY B. PLATT.

Subscribed and sworn to before me this fifth day of November, A. D. 1902.

(Signed) ERNEST K. HICKS,
[SEAL.] Notary Public.

My commission expires March 30th, 1904.

243 I have fixed the probable amount of costs of the suit of both the appellate court and the court below at five hundred dollars, and approved the forgoing bond this eleventh day of November, 1902.

(Signed) J. M. WATTS,
Clerk of the District Court of Yavapai County, Arizona.

(Endorsed:) Filed Nov. 11th, 1902. J. M. Watts, clerk.

Title and Venue.

This is to certify that I have directed John J. Hawkins, my attorney, or Hawkins & Wilson, attorneys of record for me in the above entitled and numbered cause, to appeal the above entitled and numbered cause and to execute on my behalf, the necessary appeal bond in said cause.

Dated this 20th day of October, 1902.

(Signed.) J. EDWARD ADDICKS.

(Endorsed:) Filed Dec. 4th, 1902, at 9 o'clock a. m. J. M. Watts, clerk.

Title and Venue.

This is to certify that I have directed Messrs. Atwater & Cruikshank, attorneys of record for me in the above entitled cause to appeal the above entitled and numbered cause and to execute on my behalf the necessary appeal bond in said cause.

Dated this 20th day of October, 1902.

A. W. HALLENBORG.

244 Assignment of Errors.

AXEL W. HALLENBORG, Plaintiff & Appellant,
vs.
COBRE GRANDE COPPER CO. ET AL., Defendants & Respondents.

For the consideration of the supreme court of the Territory of Arizona.

The plaintiffs in the above cause come and make the following assignment of errors for the consideration of the supreme court of Arizona on appeal in this cause, and on which they rely for a reversal of the judgment of the court below, which are as follows:

First.

At the trial of this cause the court erred in refusing to allow plaintiff Hallenborg's answer to last question propounded to him in his deposition taken, to be used by plaintiffs as evidence in this cause for the reason that said answer was material testimony for plaintiffs.

Second.

The court erred in permitting defendants, over plaintiffs' objections, to introduce in evidence and in considering the same, the stenographer's notes taken by the stenographer of the third judicial district of Arizona, taken at another and different trial pertaining to some of the matter here being litigated, for the reasons:

(*a.*) That the action was between different parties from those in the present action.

245 (*b.*) That the record in that case contains a transcript *in that case* of the evidence which could not, under any circumstances, be evidence in the case at bar.

(*c.*) That the judgment in that case was rendered subsequent to the bringing of the present action, and therefore inadmissible.

(*d.*) That the said judgment was rendered subsequent to the execution of the contract of December 12, 1900, and after W. C. Greene, the enemy of the Cobre Grande Copper Company in litigation, and its general adversary had obtained control of both sides of the litigation in all actions between himself and the Cobre Grande Copper Company by virtue of the said contract of December 12, 1900, and is therefore self-serving, and hence inadmissible.

Third.

The court erred in admitting and considering the judgment roll of the thirty-fourth judicial district of the State of Texas as evidence in this cause over the objections of plaintiffs—mainly, because the plaintiffs were not parties to said action and were not represented by anyone therein, and for the reason assigned in exception No. 2, hereinbefore assigned.

Fourth.

The court erred in admitting and considering as evidence in this cause over the objections of plaintiffs, the power of attorney to E. B. Gage, of date October 24, 1900. For the reason that the same was wholly irrelevant and immaterial in this action.

Fifth.

The court erred in admitting and considering as evidence in this action over the objections of plaintiffs, the agreement between Benjamin Orne and E. B. Gage of date January 5, 1900, because the same was irrelevant and incompetent and immaterial.

246 Sixth.

The court erred in permitting E. B. Gage, over the objection of plaintiffs, to answer the following question while on the stand testifying in his own behalf and that of other defendants, to wit:

Q. Referring to the agreement of December 12, 1900, will you state what the amount of $25,000 and the two amounts of $30,000 therein mentioned, making $85,000, was for? Because the contract speaks for itself, and that the question calls for a conclusion of the witness.

Seventh.

The court erred in admitting and considering as evidence in this action over plaintiffs' objections, an unsigned agreement of November —, 1900, because the same was clearly immaterial, and was to the injury of plaintiffs' rights herein.

Eighth.

For further causes bearing on the findings and judgment of the court based thereon. Plaintiffs further assigned as error committed by the court below the following:

The court erred in finding the issues for the defendants herein, for the reason that the evidence in the whole case does not sustain the findings, decision and judgment of the court.

Ninth.

Because the findings, and judgment of the court, are contrary to both law and equity.

Tenth.

The court erred in not finding and decreeing that the contract of December 12th, 1900, and all of the acts of the defendants
247 thereunder and in pursuance thereof, were in violation of plaintiffs' rights and in fraud of the same, and in finding and holding that plaintiffs were not entitled to the relief prayed for in their complaint—

And further, in not holding that the said agreement of December 12th, 1900, was fraudulent, illegal and void as to these plaintiffs and the Cobre Grande Copper Company; and further, in not holding and decreeing that the said agreement of December 12th, 1900, as a matter of law and equity, was a wrong and in violation of plaintiffs' rights and all others in like estate, and was therefore fraudulent as to them, and therefore in not entering judgment for plaintiffs as prayed for in their said complaint herein for the following reasons:

(*a.*) Because the same was without the consent of plaintiffs, or either of them, and over their objections.

(*b.*) Because the said contract made no provisions whatever for the creditors of said Cobre Grande Copper Company nor for its creditors, nor for any minority stockholders of said company, or any of them, nor for these plaintiffs or either of them.

(*c.*) Because said contract was wholly without consideration resulting to the said Cobre Grande Copper Company, or to any of its creditors, or to these plaintiffs, and therefore fraudulent and void.

(*d.*) Because said contract was for the purpose of surrendering the whole of the property of said company and all of its assets and things of value to the enemies and adversary of said company and without consideration for it, and which was done, and because of which, petitioners and plaintiffs were deprived of all interests (if contract is permitted to stand), in said company, and said interests are by said contract surrendered to their enemies in litigation, and without any consideration whatever.

(*e.*) Because the plaintiffs were and are large stockholders
248 in said company, and that said contract surrenders all of the property of said company to its adversary, and therefore strips plaintiffs' stock in said company of its value, all without their consent, and for no consideration resulting to them, or to the said company for them.

(*f.*) Because the said contract is a stipulatian on part of the majority of the directors of said company in consideration resulting to themselves individually, and for individual profits to themselves, to turn over to its adversary in litigation all of the property of the said Cobre Grande Copper Company and the whole control of said company to its said adversary, while the said Cobre Grande Copper Company received nothing in exchange, or in return, for such surrender.

(*g.*) Because said contract on its face contemplates the payment of certain sums of money to the officers of said company to induce them to enter into it, and therefore a fraud on these plaintiffs.

(*h.*) Because said contract on its face shows that for considerations resulting to the officers and directors individually the control of said company was surrendered to the adversary of said company in litigation who was thereby enabled to, and given power to control both sides of the litigation; and was for the surrender of the offices to the said adversary of said litigation, and was therefore the bartering away of the offices of the said company without any considera-

tion resulting to the said company and for personal consideration resulting to said officers agreeing to resign and turn the offices over to others of the adverary,—and therefore a fraud on the plaintiffs' rights and others in like estate, and on the rights of the said Cobre Grande Copper Company.

Eleventh.

Because the said contract was *ultra vires*, illegal and void
249 for the reasons that it involved the sale of all of the corporate property of said company without the unanimous consent of all of the stockholders of said company; and that the sale was made, not for the purpose of the dissolution of the company, but for the purpose of delivering and transferring the same to its adversary; and, therefore, said contract was a fraud on the rights of these plaintiffs and said company, and the court below erred in not so holding.

Twelfth.

Because the court erred in holding that the action of E. B. Gage as president of said company, and as trustee of the stockholders of the same, as set forth in said contract, was not fraudulent, for the reasons:

(*a.*) That the said actions of the said Gage were induced by the said contract for considerations resulting to him as an official of said company, and without consideration resulting to the said company, of which he was its president.

(*b.*) Because his said action as shown by said contract on its face, was the bartering away the office which he then held in said company without consideration to the company, and for personal consideration to himself, none of which were provided for by the charter or by-laws of the company.

(*c.*) Because the actiou of the said Gage, as shown by said contract on its face, as trustee of said stockholders, resulted in leaving the trust imposed in his hands as such trustee, and which he had before accepted, without a trustee, a thing that equity will never permit. Hence, error on the part of the court below.

Thirteenth.

The court below erred in not holding said contract of December 12, 1900, void and in refusing to grant the relief prayed for by plain-
tiffs, because it shows on its face that it is the result of a com-
250 bination of the stockholders holding a majority of the stock of said company to sell out the business of the said company and to turn over the control of said company and all of its business without regard for the interests of said company as such company, and also without any regard whatever for the rights of the minority stockholders of the said company or its creditors.

Fourteenth.

The court below erred in not granting the relief prayed for by plaintiffs because the proof showed in the cause that the Cobre Grande Copper Company was, and had long been, in possession of all the mines and mining property in the Cananea mountains in the Republic of Mexico, which makes the real subject of this litigation; and that said possession was lawful and by virtue of the lawful contract of defendant, W. C. Greene, and that while thus in said lawful possession the said Greene and his confederates Mitchell and others acting with him, unlawfully seized the said mines and all property connected therewith, and the control of said company, and ousted said company of its said lawful possession without right, and thereby deprived said company and disarmed it from power, to make the payment of $37,500, to fall due thereafter, that is, after the said unlawful seizure, and that the said seizure was the result of a conspiracy of the said Greene and Mitchell and other confederates of the said Greene and Mitchell to prevent the said company from making the said payment, and which payment would have been made at date it should have become due but for the said unlawful seizure aforesaid.

Fifteenth.

The court below erred in not granting the relief prayed for by plaintiffs, because: the evidence showed that the president, E. B. Gage, and also its directors, had received for their own use and benefit, while contracting for and about the said company's
251 affairs, large sums of money which should have been accounted for to said company, or to a receiver appointed for the purpose of representing the said company and minority stockholders as prayed for, and, in this complaint was so made to the court below, and an accounting prayed for to be made to such receiver for the use and benefit of the said Cobre Grande Copper Company. Hence, patent errors by the court below, in not holding that the said contract was void, that an accounting should be had, and that for that purpose a receiver should have been appointed to take charge of the said Cobre Grande Copper Company and its business, conduct the same, take said accounting, etc., etc.

Sixteenth.

The court erred in making the following findings, viz.:

1. That the defendant Greene offered to purchase the Cobre Grande Copper Company stock held by Gage as trustee upon better terms than anybody else had offered.

2. That the directors and a large majority of the stockholders of the Cobre Grande Copper Company urged Gage to enter into a contract with Greene for the sale of said stock.

3. That the contract of December 12th, 1900, was entered into by defendant Gage in good faith.

4. That the contract of December 12th, 1900, was entered into by defendant Gage upon the advice of counsel of the Cobre Grande Copper Company that that company could not successfully maintain its suit No. 3437.

5. That the contract of December 12th, 1900, was entered into by defendant Gage with the belief on his part that the said contract was for the best interests of the said company and its stockholders.

252 6. That all the suits mentioned in the complaint herein, except the suits pending in the State of New York, were dismissed or otherwise disposed of by final judgment prior to this action.

7. That the five thousand shares of stock of the Greene Consolidated Copper Company mentiioned in the contract of December 12th, 1900, and therein agreed to be paid to the defendant Gage were intended by the parties to said instrument as compensation to said Gage for services rendered by him as president of the Cobre Grande Copper Company, and compensation for time, labor, trouble and attention to said company's business and money advanced to said company and expenses in attending to the affairs of said company and in connection therewith.

8. That the five thousand shares of stock of the Greene Consolidated Copper Company mentioned in said contract of December 12th, 1900, as agreed to be paid to L. H. Chalmers, Baker & Bennett and Herndon & Norris, attorneys for the Cobre Grande Copper Company were intended to be paid as compensation for their services rendered to said company in various litigations.

9. That the sums of $25,000 and $30,000 and the three thousand shares of stock of the Greene Consolidated Copper Company mentioned in said contract were intended to be paid for the purpose of discharging debts due by the Cobre Grande Copper Company or to be turned into the treasury of the company.

10. That the proofs tend to show that the services of L. H. Chalmers, Baker & Bennett and Herndon & Norris in litigations conducted by them on behalf of the Cobre Grande Copper Company were reasonably worth the sum of $50,000, in addition to the sums already paid them on account thereof.

253 11. That as the case stood at the trial of this action there was nothing before the court except an application for the appointment of a receiver.

Seventeenth.

The court erred in holding that upon the facts established at the trial, plaintiffs were not entitled to have a receiver appointed for the Cobre Grande Copper Company, it appearing that the directors then in office were hostile to the interests of the company and had procured control of the said company and the appointment of its directors for the sole purpose of preventing the company from prosecuting its claims to the mines in Mexico, and to enable the said William C. Greene, Cananea Consolidated Copper Company and the

Greene Consolidated Copper Company to remain in possession thereof.

Eighteenth.

The court erred in finding that the suit therein mentioned of the Cobre Grande Copper Company against William C. Greene and others in Maricopa county was dismissed by the court on April 15th, 1901, after full consideration of the cause, since it appears that at that date William C. Greene and his associates had obtained full control of both sides of the controversy and the judgment was entered pursuant to the agreement of December 12th, 1900, and on April 15th, 1901, there was no real controversy pending before the court and any judgment entered was collusive and void as to these plaintiffs and of no force or effect as to them.

Nineteenth.

The court also further erred in overruling plaintiffs' motion for a new trial for the reasons specifically as stated therein and for the errors hereinbefore set forth.

All of which assignments and specifications of error are most respectfully submitted and reversal prayed for thereon.

HAWKINS & WILSON,
Attorneys for Plaintiffs.

254 TERRITORY OF ARIZONA, County of Yavapai, } ss:

A. W. HALLENBORG ET AL., Plaintiffs and Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Defendants and Appellees. } No. 3268.

I, J. M. Watts, clerk of the district court of the fourth judicial district of Arizona, in and for the county of Yavapai, do hereby certify, that the foregoing and hereto attached is a full, true and complete transcript on appeal, of the amended complaint, amended answers, replications, answer to cross complaint, decision of the court, findings, judgment, exceptions to findings, motion for new trial, assignment of errors, appeal bond, bill of exceptions containing evidence as settled by the court, together with the minute record in the above entitled case, as the same appears of record now on file in my office, and the same constitute the full and complete record upon which said cause was tried in said court.

Witness my hand and the seal of said court, at Prescott, this — day of January, 1903.

[SEAL.] JAS. M. WATTS, Clerk.

255 In the Supreme Court of the Territory of Arizona.

AXEL W. HALLENBORG ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees. } No. 822.

Appeal from the District Court of the County of Yavapai Before Justice R. E. Sloan.

Messrs. John J. Hawkins, J. F. Wilson, A. B. Cruikshank, and Henry G. Atwater, for appellants.
Messrs. Barnes & Martin, L. H. Chalmers, Herndon & Norris, Ben Goodrich, and Eugene S. Ives, for appellees.

Opinion by KENT, C. J.:

The amended complaint in this action contains in substance the following allegations:

That the plaintiffs are stockholders in the Cobre Grande Copper Company, an Arizona corporation, one of the defendants herein, and that the plaintiff Hallenborg is a creditor of said company; that since January 1st, 1900, the said Cobre Grande Copper Company has been engaged in a series of litigation with the defendants William C. Greene, George Mitchell, and their associates, confed-
256 erates and agents; that said litigation, among other things, involved the title and right of possession to certain mining property situate in the State of Sonora, Republic of Mexico; that the Cobre Grande Copper Company claims to be the rightful owner and entitled to the possession of said property, and that the defendant Greene wrongfully and fraudulently had dispossessed said company, and is now in the wrongful and fraudulent control of the same; that suits are pending in the courts of Mexico, brought by the Cobre Grande Copper Company to recover possession of said property; that actions in replevin, instituted by the company, are pending in New York and in Texas; that there was pending, at the time of the commencement of this suit, an action in the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, against the defendant Greene, the defendant Mitchell and the defendant Phœnix National Bank, to prevent the delivery by said bank to said Greene of certain deeds to said mining property, held by said bank in escrow, and to have the rights of the Cobre Grande Copper Company in and to a certain contract of sale and purchase of said property determined and adjudged; and that said action was brought in aid of the efforts of the said Cobre Grande Copper Company to recover said property, and to have the right of the Cobre Grande Copper Company after the restoration of the possession of said mines, to make a payment of

$37,500.00 due under said agreement for the purchase declared
257 to be an existing right, and that said contract of purchase be declared to be in full force and effect, and for an accounting by Greene; that on December 12, 1900, for the purpose of controlling the suits brought by the Cobre Grande Copper Companyas aforesaid, said Greene and the Greene Consolidated Copper Company entered into fraudulent and corrupt contract and conspiracy with the defendant E. B. Gage and other directors of the Cobre Grande Copper Company, wherein it was agreed between the said Greene and the said Greene Consolidated Copper Company on the one side, and the defendant E. B. Gage and The Cobre Grande Copper Company, by said E. B. Gage president, on the other side substantially as follows: that the said Greene and The Greene Consolidated Copper Company agreed to buy from the defendant Gage 115,049 shares of stock of the Cobre Grande Copper Company, held by him as trustee for certain stockholders of said company, at the price of $2.50 per share; and that upon the purchase of said stock being made the defendants, Adamson, Costello, Wood and O'Keefe, as a part of said transaction, would resign as directors of said Cobre Grande Copper Company; and that said Greene and the Greene Consolidated Copper Company should thereupon be allowed to elect and appoint the officers and directors of the Cobre Grande Copper Company in their own interests; and that, further, the suits, actions and proceedings brought by the Cobre Grande Copper Com-
258 pany for the protection of its rights against the said Greene, Mitchell and the Greene Consolidated Copper Company should be dismissed; that as a further consideration of said agreement, it was agreed that said Gage should receive for himself five thousand shares of the stock of the Greene Consolidated Copper Company, alleged to be at the time of the market value of ten dollars per share. And further, that the defendant Costello, a director of said Cobre Grande Copper Company, should have large personal benefits to himself, to-wit: that his note for $23,000.00, to the Cobre Grande Copper Company, should be surrendered to him; that the other directors, Adamson, Wood and O'Keefe, by a secret compact and arrangement, between them and the said Greene and the said Greene Consolidated Copper Company, were to receive additional gains and advantages, either by way of stock in the Greene Consolidated Copper Company, or in some other way; that said agreement and the whole thereof was and is illegal and fraudulent as to the plaintiffs, and as to all other persons, creditors and stockholders similarly situated; and that the object and effect thereof is to transfer to the enemies of the Cobre Grande Copper Company the management and control of the corporation with the intent and design that such management and control should be used to prevent the said Cobre Grande Copper Company from enforcing its rights as against said Greene and said Greene Consolidated Copper Company to obtain possession of
259 said property and to complete its contract for the purchase thereof; that the Cobre Grande Copper Company is possessed

of no property or assets other than the choses in action represented by said suits; and that if the latter be discontinued or dismissed said company will be without property or funds with which to pay its debts or to distribute in the way of profits or dividends among its stockholders; that the said mining property is of great present and prospective value, namely: of the value of $5,000,000 or thereabouts; that the defendants Greene and Mitchell, The Cobre Grande Copper Company, and The Greene Consolidated Copper Company threaten and intend, for the of destroying and wrecking the Cobre Grande Copper Company, to dismiss or cause to be dismissed and discontinued the said suits and to turn over all the assets of the property of said Cobre Grande Copper Company to said Greene, Mitchell or the Greene Consolidated Copper Company, or some other controlled by them.

On these facts as alleged, the plaintiffs prayed for the following relief, to-wit:

For an injunction restraining the defendants from discontinuing or causing to be discontinued or dismissed each and all of said pending suits; that a mandatory injunction issue directing said defendants to faithfully prosecute and pursue in behalf of the Cobre Grande Copper Company all said actions and proceedings; that the
260 plaintiffs be made parties in such suits; that a receiver be appointed to take possession of the assets and property of the Cobre Grande Copper Company with power to prosecute and maintain said actions, and to bring such other and further suits as may be necessary to protect the rights of said company; that the defendants Gage, Adamson, Costello, Wood and O'Keefe be removed from their offices and as directors of the company, and that the Phœnix National Bank be restrained from delivering the title deeds to the property to Greene and Mitchell.

On the trial of the cause the following uncontroverted facts were established, to-wit:

That the action brought by the Cobre Grande Copper Company in the State of Texas has been dismissed prior to the issue of the temporary injunction; that the action which was pending in the State of New York is still pending and undetermined, and that the defendants have been enjoined by an order of one of the courts of that State from dismissing said action or causing it to be dismissed; that the action pending in the district court of Maricopa county was decided and had gone to judgment, and that as a part of said judgment the Phœnix National Bank was commanded to and had delivered up the papers and documents to Greene, and that the directors whose removal was desired had resigned and had ceased to be officers or directors of the company.

The trial court rightly held that in view of these facts an
261 injunction could afford the plaintiffs no relief, and as the case stood the only question left was whether a receiver should be appointed.

The question presented on this appeal for our determination, is

whether, in view of the pleadings and the admitted situation of the parties at the time of the trial of the action, the district court was within a proper exercise of its discretion in refusing to appoint a receiver. If so, judgment was properly entered for the defendants.

The grounds on which the receivership is asked are, substantially: That the suit in the district court of Maricopa county was brought in good faith by the Cobre Grande Copper Company to recover from Greene the possession of the Mexican property; that the agreement of December 12, 1900, whereby that suit and the various other suits were to be dismissed, was and is fraudulent, because it provided no adequate consideration to be paid the Cobre Grande Company and because the directors of the company themselves received money as a consideration for its execution; that the judgment rendered in the district court of Maricopa county was not an estoppel of record, as it was collusively obtained, Greene having obtained control of both sides of the litigation, after the trial, but prior to the entry of the judgment; and that by this agreement and by the entry of this collusive judgment Greene and his associates have deprived
262 these appellants, as minority stockholders, of valid rights and interests, and have prevented a recovery of the Mexican property.

The purposes for which a receiver is asked are twofold, so far as the record is concerned: First, that he may take charge of the property of the company; second, that he may prosecute its litigation. As was pointed out by the district court, the only property of the company within the jurisdiction of the court is the funds in the treasurer's hands, acquired by the company by virtue of the agreement of December 12th, the validity of which is disputed by the plaintiffs. If the agreement was invalid, as claimed by the plaintiffs, the court could not consistently have appointed a receiver of property acquired solely by means of the agreement; on the other hand, if the agreement was valid, the plaintiffs admittedly had no sufficient cause of action for the appointment of a receiver, or otherwise. The sole remaining purpose for which the receiver was to be appointed was to prosecute such litigation as should reinstate the company as a litigant in the position it was at the time of the execution of the agreement, with the ultimate object and purpose of regaining the Mexican property; and the complaint and the record in the case clearly show that this, and not the administration of the fund, is in reality the purpose for which the receiver is desired.

In the view we take, it is not incumbent on us, nor proper
263 for us to determine in the case before us whether the judgment in the action in the district court of Maricopa county was a proper and valid judgment, or whether the agreement of December 12th was illegal and without consideration, nor is relief in this respect prayed for in the complaint. The question for us to determine is whether the district court, in refusing to appoint a receiver in this action, exercised a sound judicial discretion based upon

a due consideration of the facts and the rights and interests of the respective parties.

Apart from the question whether the court has the power to appoint a receiver where no relief other than the appointment of a receiver is asked for or can be granted under the pleadings of the facts—which we do not deem it necessary to determine—we are of the opinion that under the facts in this case, the district court was within a proper exercise of its discretion in its refusal to appoint a receiver. As the matter then stood, the district court of Maricopa county had, by its judgment, valid upon its face, determined adversely to the company its claims to the Mexican properties. While this judgment stands, the appointment of a receiver will not aid the company or the plaintiffs in the recovery of the Mexican properties; for the judgment stands in the way of any assertion of rights to the property. The validity of this judment is strenuously denied by the plaintiffs, but its invalidity must be determined in an
264 action brought directly for that purpose, and until so determined it is a bar to the recovery of the property by any one on behalf of the corporation. Such an action can be instituted and prosecuted by the plaintiffs as minority stockholders, and a receivership is not necessary for such purpose. If such action should result in the vacating and setting aside of the judgment, the same minority stockholders, if the corporation or its officers refuse so to do, can maintain as fully as such corporations such actions looking to the enforcement or determination of its property rights as may be necessary or proper. Such proceedings for the determination and adjudication of the rights of the plaintiffs, and of the company, can be instituted and prosecuted with practically the same force and effect by these stockholders as if instituted and prosecuted by a receiver appointed for that purpose. The institution of such actions being the sole purpose of the appointment of a receiver we cannot say that the court was not exercising a sound discretion in refusing to make such appointment, and through its receiver embark in such litigation, in view of the possible harm to the company that might result from a receivership, where the plaintiffs themselves had a complete and adequate remedy of which they might avail themselves without the interposition of a receiver.

It is urged that a receiver, being in possession of the books and records of the company, would be in a better position to prose-
265 cute such actions than a stockholder, who might be denied an inspection thereof. In any event, such reason affords no sufficient ground in itself for the appointment; but the courts of this Territory are not loath to lend their aid, when necessary, by effectual process to enable a stockholder to obtain access to the records of his corporation, in a proper case and for a proper purpose.

Upon a full review of the pleadings and the admitted facts in this case, we are of the opinion that the district court was well within the exercise of sound discretion in refusing to appoint a receiver

herein, and that there was not any other relief which the court could properly grant the plaintiffs in this action. The judgment will therefore be affirmed.

EDWARD KENT, C. J.

We concur:
FLETCHER M. DOAN, A. J.
GEO. R. DAVIS, A. J.

(Endorsed:) No. 822. In the supreme court of the Territory of Arizona. Axel W. Hallenborg, *et al. vs.* Cobre Grande Copper Company, *et al.* Opinion. Recorded Book 5, pages 411–418. Filed Jan'y 12, 1904. S. M. Cullom, clerk. By Angie B. Parker deputy.

266 In the Supreme Court of the Territory of Arizona.

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants, *vs.* COBRE GRANDE COPPER COMPANY ET AL., Appellees.	No. 822. Motion for Rehearing.

Come now appellants in the above entitled appeal and move this honorable court to grant a rehearing of said appeal, and for grounds of their motion show to the court:

I.

That the court in its decision rendered on the 13th day of January 1904, in the above entitled matter, erred in refusing to reverse the judgment appealed from and to decree to appellants the relief asked by them in the court below.

II.

That the court in its said decision erred in holding that it was not incumbent upon it in this cause to determine whether or not the agreement of December 12, 1900, was illegal and without consideration.

III.

That the court in its said decision, erred in refusing to reverse the judgment appealed from and to decree that the agreement of December 12, 1900, and all acts of appellees in pur-
267 suance thereof, were in violation of appellants' rights and entitled appellants to relief in a court of equity.

IV.

That the court in its said decision, erred in refusing to reverse the judgment of the trial court and to hold that the agreement of December 12, 1900, was a fraud upon the rights of appellants as min-

ority stockholders and creditors of the Cobre Grande Copper Company.

V.

That the court erred in failing to hold that the court below had power under the statutes of Arizona, to appoint a receiver of the Cobre Grande Copper Company under the facts shown in this case, and in refusing to reverse the judgment of the lower court and to direct the appointment of such receiver, for the reasons following, to wit:

(*a.*) That the appointment of such receiver is within the chancery powers of the district courts of Arizona, independent of statutory authority.

(*b.*) That such power rests in such court, especially, in the case of fraud or mismanagement by the officers, directors or majority stockholders, inimical to the interests of a corporation, as appears in the case at bar.

(*c.*) That, under the facts proved in this case, the appointment of such receiver, as prayed for by appellants, offers the only adequate remedy for the wrongs of which they complain.

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VI.

That the court in its decision erred in holding that it was not incumbent upon this court in this cause to determine whether or not the Maricopa county judgment was a proper and valid one, for the reason that it appears from the evidence that said judgment was collusively and fraudulently entered under circumstances which render it no judgment at all, but merely a nullity which should not be allowed in any court to stand between appellants and their rights and remedies.

VII.

That the court erred in refusing to hold that said Maricopa County judgment was collusive, fraudulent and absolutely void.

VIII.

That the court erred in holding that said Maricopa County judgment is conclusive in the case at bar, until set aside by direct proceedings instituted for that purpose in the court where such judgment was rendered, for the reason that said judgment is a nullity and may therefore be collaterally questioned and ignored in any court.

IX.

That the court erred in holding that the only question presented to the trial court in this cause and to this court upon this appeal was as to the appointment of a receiver of the Cobre Grande Copper Company, for the reasons following, to-wit:

269 (*a.*) That, under the pleadings and proof in this case, the court might properly and should have passed upon the validity of the agreement of December 12, 1900.

(*b.*) That, under said pleadings and proof, the court might properly and should have passed upon the validity of the Maricopa County judgment and decreed that the same was absolutely void, and furthermore, that the deeds delivered to appellee Greene by the Phœnix national bank in obedience to said judgment, should be forthwith returned to said bank.

(*c.*) That, under said pleadings and proof, the court might properly, and should have ordered and decreed that the time for the payment by the Cobre Grande Copper Company of the installment of thirty-seven thousand, five hundred ($37,500.00) dollars, and all other installments under its contract for the purchase of the mines in controversy, be extended to a reasonable time after its restoration to possession of said mines.

(*d.*) That, under said pleadings and proof, the court might properly, and should have passed upon the right of appellants to an accounting to the Cobre Grande Copper Company from appellees Greene, Cananea Consolidated Copper Company and Greene Consolidated Copper Company, for the property of said Cobre Grande Copper Company, including the produce of said mines, taken or appropriated by them.

X.

270 That the court erred in holding that the trial court committed no abuse of discretion in refusing to appoint a receiver as prayed for in appellants' complaint, for the reason that the evidence in this cause made a clear case for the appointment of a receiver as prayed for, and furthermore, a case in which the grievances of appellants can not be adequately remedied otherwise than by the appointment of such receiver.

XI.

That the court erred in affirming the judgment appealed from and in failing to hold that, in spite of changed conditions subsequent to the filing of appellants' complaint, they were entitled to full relief under the conditions proven and to have the deeds, which were delivered to appellee Greene in pursuance of the Maricopa County judgment and in furtherance of the agreement of December 12, 1900, ordered returned to the Phœnix national bank to await the determination of this litigation.

XII.

That the court erred in holding that appellants are not entitled to the appointment of a receiver because they have an adequate remedy in an action prosecuted in their own behalf as minority stockholders, for the reasons following, to-wit:

(*a.*) That the existence of such other remedy, if it exists, is no bar

to appellants' election of their remedy through a receivership, especially, where it appears as in the case at bar, that the remedy through a receivership is the more adequate and complete of
271 the two remedies.

(*b.*) That the remedy pointed out by the court is not an adequate remedy for the wrongs and grievances complained of and proven by appellants.

XIII.

That the court erred in refusing to reverse the judgment appealed from and to order the appointment of a receiver as prayed for, upon the ground of possible harm which might accrue to the Cobre Grande Copper Company through the appointment of such receiver, for the reason that it appears from the evidence that the Cobre Grande Copper Company at the present time is in the control of its enemies who are its officers, directors and majority stockholders, that said company is without assets other than the choses in action sought to be enforced in this litigation, and furthermore, that at the present time said company has merely a nominal existence and activity, for all of which reasons, it would be impossible for said company to suffer any damage or detriment from the appointment of such receiver.

XIV.

And further showing cause that their motion for a rehearing should be granted, appellants show to the court the following facts established by the evidence in this case.

Prior to December 12, 1900, there was pending in the district court of Maricopa county, an action between the Cobre Grande
272 Copper Company — sought to recover possession of the valuable mining properties involved in the case at bar and to restrain the escrow holder of certain deeds to said properties from delivering the same to W. C. Greene. The subject matter of that litigation was all of the property of the Cobre Grande Copper Company and the practical issue in the case was whether or not said company should be stripped of all its properties and left a wrecked and insolvent institution. An injunction was issued as prayed for and after argument, was continued in force. On October 23, 1900, the case came on for trial and after a trial "covering a period of many days," in the words of Chief Justice Street, who decided the case, the same was submitted to the court and taken under advisement. For some time the decision of the court was reserved.

At this time, E. B. Gage was the president of the Cobre Grande Copper Company and J. H. Costello with others, was on the board of directors. The company's attorneys in the case mentioned were Messrs. Chalmers and Jameson, Herndon & Norris, and Baker & Bennett. The Cobre Grande Copper Company was largely in debt. These debts had been incurred by it in raising funds for the prosecution of its litigation against the Greene interests. Among its

creditors was A. W. Hallenborg appellant herein, to whom the company owed upwards of forty thousand ($40,000.00) dollars. The company also had some assets aside from the properties in
273 volved in the litigation, among which was twenty-three thousand ($23,000.00) dollars owing to it from J. H. Costello, one of its directors, whose note for this amount the company then held. There was a large number of stockholders of the Cobre Grande Copper Company, among whom were appellant Hallenborg, who had purchased upwards of eight thousand (8000) shares of stock in July, 1900, and appellant Addicks, who had purchased five thousand (5000) shares at or near the same time.

On October 24, 1900, and while the trial of the above mentioned case was in progress, a number of the stockholders of the Cobre Grande Copper Company, appellant Hallenborg among them, pooled their stock, amounting to one hundred and fifteen thousand forty-nine (115,049) shares, in the hands of E. B. Gage as trustee. On December 12, after the trial of said case was completed and had been submitted to the court, the now famous agreement was entered into between E. B. Gage and the Cobre Grande Copper Company on one side, and W. C. Greene and Greene Consolidated Copper Company on the other.

The admitted purpose of this agreement was to put an end to all litigation between the Cobre Grande Company and the Greene interests, as well as to totally strip said company of all right, title or interest in the mining properties involved in that litigation and, finally, to leave the Cobre Grande Copper Company absolutely wrecked and deprived of everything except a mere nominal existence.
274 Certain persons then interested in the Cobre Grande Copper Company were provided for in this agreement. Mr. Gage received fifty thousand ($50,000.00) dollars or its equivalent, and the above mentioned attorneys who represented the Cobre Grande Copper Company in its fight with the Greene interests, received from Greene and the Greene Consolidated Copper Company, a like consideration. J. H. Costello, the director of the company who was indebted to it in the sum of twenty-three thousand ($23,000.00) dollars, was given a receipt in full for that amount in consideration of his acquiescing in the terms of the agreement. No provision was made for appellant Hallenborg, to whom the company owed over forty thousand ($40,000.00) dollars, but he was not an officer or director of the company.

The peculiar features of this agreement, as shown by the proof in this case and admitted by all parties, are worthy of notice. E. B. Gage signed in two capacities—first, as trustee under the pooling contract; second, as president of the Cobre Grande Copper Company; but in both capacities he was acting for the same interest, namely, that of the stockholders whose stock he held in pool. The stockholders outside of the pool, among whom was appellant Addicks at that time, and later, when he had learned of Gage's acts and withdrawn from the pool, appellant Hallenborg, were absolutely ignored.

The Cobre Grande Copper Company was named as a party to this agreement and was one of the signers. Nothing appears in
275 said agreement, indicating by any possible construction that any consideration was to be received by the Cobre Grande Company for its participation in the agreement. It may be stated that, later, when appellant Hallenborg had withdrawn from the pool and taken steps to protect his rights, and after the old board of directors and officers of the Cobre Grande Company had been replaced by appointees of Greene, when Judge Barnes, Greene's principal counsel, was treasurer of the Cobre Grande Company, a receipt appears to have been given by Judge Barnes, as treasurer, to E. B. Gage for sixty thousand ($60,000.00) dollars, ostensibly paid to the Cobre Grande Company in pursuance of the agreement of December 12, but from the agreement itself, it appears that without the receipt of any consideration whatsoever, the Cobre Grande Copper Company consented to renounce all its rights, titles or interests in the mining property then in litigation, to dismiss all suits then pending, to sell itself to the Greene interests and to allow Greene and those interests to name its directors and officers. In pursuance of this agreement, a first payment was made to Gage by the Greene interests, out of which he remitted to appellant Hallenborg, an amount equalling fifty cents (50c.) per share on the stock of Hallenborg held in the pool. Being thus notified of the contract, appellant Hallenborg refused to abide by the same, returned the check sent him by Gage and at once took steps to protect his interests as
276 a minority stockholder. The Maricopa County suit was still held under advisement by the court. Appellant Hallenborg at once petitioned for leave to intervene in that suit, which was denied upon the technical ground that the petition for intervention came too late. An appeal was taken from this denial of the right to intervene and the appeal was dismissed by this court upon the ground that an order denying petition for intervention was not appealable. No hearing upon the merits was had in that decision, nor was any attention paid to the facts presented in the pleadings.

On April 3, 1901, the directors of the Cobre Grande Copper Company held a meeting at which, in performance of the agreement December 12, a resolution was passed, turning over the entire conduct and management of the company's affairs to William C. Greene. A meeting of the stockholders was also held, at which the contract of December 12 was ratified, the stockholders participating in this ratification, holding a majority of the stock and constituting all of those persons whose stock had been placed in the hands of E. B. Gage as trustee and sold under the agreement of December 12, excepting the stock of appellants Hallenborg and Addicks, aggregating upwards of thirteen thousand (13,000) shares, and other scattering shares of upwards of one thousand (1000) in number. On April 15, 1901, the Maricopa County suit was resubmitted to the court under circumstances that leave no room for doubt that it was tacitly under-
277 stood that the decision should be forthwith rendered against the Cobre Grande Company and in favor of the Greene inter-

ests. Such a decision was rendered and judgment entered thereon and the deeds held in escrow by the Phœnix national bank, were ordered by the court to be forthwith delivered to Greene.

Before this decision had been entered, the present action was instituted in the district court of the fourth judicial district and a preliminary injunction issued in accordance with the prayer of the complaint, enjoining the delivery by the Phœnix national bank of the aforesaid deeds held by it in escrow, and also the dismissal of the suit then pending in Maricopa county. The temporary injunction against the dismissal of this suit, however, did not cover the contingency which actually arose and did not provide against the course actually taken by the Greene interests to dispose of the Maricopa County suit, and when the present suit came on for hearing, it was found that the deeds mentioned in the aforesaid injunction had been delivered by order of the Maricopa court and the suit in Maricopa County court had been decided in favor of the Greene interests. A bare statement of the facts surrounding the entry of the judgment in the Maricopa County suit, would be sufficient to stamp it as collusive and fraudulent and, therefore, void, but it appeared of such binding force to the trial court in this action as to be *res adjudicata* of many of the matters sought to be raised here.

278 In this action appellants sought to secure the appointment of a receiver of Cobre Grande Copper Company as a means of obtaining relief from the various conditions above set out, which, if undisturbed, would leave them utterly deprived of all their interest in the Cobre Grande Copper Company and leave their stock in that company absolutely valueless. The court held that a proper case for the appointment of a receiver was not presented, especially, since the relief to which the plaintiffs were entitled under the facts alleged could be obtained by them in an action brought directly in their capacity as minority stockholders. The merits of the case were not looked into or passed upon in any degree whatever.

From this decision of Judge Sloan the present appeal was taken. In presenting the matters involved therein to this court, appellants showed by abundant citations of authority that, (1), the agreement of December 12, 1900, and all acts of defendants in pursuance thereof, were in violation of appellants' rights and entitled them to relief in a court of equity; (2), that said agreement constituted a grievous wrong against appellants as minority stockholders and creditors and was fraudulent as to them; (3), that, under the proof in this case, the court had power and should have appointed a receiver as prayed for; (4), the judgment entered in the suit in the district court of Maricopa county was collusive and void and in no sense con-

279 clusive of anything in this action; (5), that the appointment of a receiver in this proceeding, under the proof shown, was essential to the full and adequate relief of the appellants.

The decision heretofore handed down by the court in this action disposes of the case without reference to any of its merits and follows the decision of the court below in holding that a proper case

for the appointment of a receiver is not presented. The other points urged by appellants as stated above, are ignored. In all of which we submit that the decision of this court is erroneous and that, under the pleadings and proof in this case, it was incumbent upon the trial court as well as upon this court, to pass upon the merits of the action and to accord to appellants the relief to which they are plainly entitled, and we respectfully ask for a rehearing of this appeal for the purpose of reviewing the errors herein set forth.

Respectfully submitted.

(Signed) JOHN J. HAWKINS,
A. B. CRUIKSHANK,
J. F. WILSON,
HENRY G. ATWATER,
Attorneys for Appellants.

JOHN J. HAWKINS,
J. F. WILSON,
Attorneys for Appellants.

(Endorsed:) In the supreme court of the Territory of Arizona. Axel W. Hallenborg and J. Edward Addicks, appellants, *vs.* Cobre Grande Copper Company *et al.*, appellees. No. 822. Motion for rehearing. Hawkins, Ross & Anderson, attorneys, Prescott, Arizona. Received copy of within this 25th day of January, 1904. Herndon & Norris, attorneys for appellees. Filed Jan'y 26, 1904. S. M. Callom, clerk. John J. Hawkins, J. F. Wilson, A. B. Cruikshank, Henry G. Atwater, attorneys for appellants.

280 In the Supreme Court of the Territory of Arizona.

AXEL W. HALLENBORG and J. Edward Addicks, Appellants,
versus
COBRE GRANDE COPPER COMPANY, a Corporation, *et al.*, Appellees.

Affidavit of Value of Matter in Dispute.

TERRITORY OF ARIZONA, County of Maricopa, } *ss:*

John J. Hawkins, being first duly sworn according to law, deposes and says:

That he is one of the attorneys of record of the above named appellants in the above entitled appeal; that he is acquainted with the subject matter in controversy in said appeal; that he is the agent of said appellants and makes this affidavit in their behalf; that the matter in dispute in the above entitled cause, exclusive of interest, exceeds in value, the sum of five thousand ($5000.00) dollars, the same being the value of the indebtedness of the Cobre Grande Copper Company sued upon, and of the stock of said company held by said appellants.

JOHN J. HAWKINS.

281 Subscribed and sworn to before me, this 26th day of March, A. D., 1904.

[SEAL.] SHELBY M. CULLOM,
Clerk Supreme Court of Arizona,
By ANGIE B. PARKER, Deputy.

(Endorsed:) No. 822. In the supreme court of the Territory of Arizona. Axel W. Hallenborg and J. Edward Addicks, appellants, *versus* Cobre Grande Copper Company, a corporation, *et al.*, appellees. Affidavit of value of matter in dispute. Hawkins, Ross & Anderson, attorneys, Prescott, Arizona. Filed March 26, 1904. S. M. Cullom, clerk. Atwater & Cruikshank, J. F. Wilson, Hawkins, Ross & Anderson, attorneys for appellants.

282 In the Supreme Court of the Territory of Arizona.

AXEL W. HALLENBORG and J. EDWARD Addicks, Appellants, *versus* COBRE GRANDE COPPER COMPANY, a Corporation, *et al.*, Appellees.	Petition for Statement of Facts in the Nature of a Special Verdict.

Come now the above named appellants, and respectfully petition this honorable court to make and certify the following as a statement of facts in the nature of a special verdict, for the purposes of an appeal to the Supreme Court of the United States in the above entitled action:

The supreme court of Arizona, being in session and hearing the above entitled case on appeal from the district court of the fourth judicial district of the Territory of Arizona, in and for the county of Yavapai, makes and certifies the following statement of the facts of said case in the nature of a special verdict:

I.

That the appellee, Cobre Grande Copper Company, is now, and at the time of the commencement of this action was, a corporation organized under the laws of the Territory of Arizona and having its principal office at Phœnix, in said Territory, having a capital
283 stock of five hundred thousand ($500,000.00) dollars, divided into two hundred thousand (200,000) shares of the par value of two and 50/100 ($2.50) dollars each.

That appellees, Adamson, Costello, Wood, and O'Keefe, were directors of said Cobre Grande Copper Company from and prior to December 12, 1900, until April 3, A. D., 1901, at which time they resigned as directors and their successors were elected and qualified, and since which time, they have had no connection with said company; that appellee, E. B. Gage, was a director and the president of said Cobre Grande Copper Company from and prior to December

12, A. D., 1900, until April 2, A. D. 1901, at which time, he resigned as such director and president, and since which time, he has not been connected with said corporation; that appellee Wood was secretary of the said Cobre Grande Copper Company from and prior to December 12, 1900, up to about April, A. D., 1901, at which time he resigned as such secretary, and since which time, he has had no connection with said company.

That appellee, Phœnix National Bank, was at the time this action was commenced, and is now, a corporation organized under the laws of the United States and having its principal place of business at Phœnix, in the Territory of Arizona; that appellee, Cananea Consolidated Copper Company, was at the time this action commenced,
and is now, a corporation organized under the laws of the
284 State of Sonora, Republic of Mexico; that appellee, Greene
Consolidated Copper Company, was, at the time this action was commenced, and is now, a corporation organized under the laws of the State of West Virginia.

That appellees, Gage and Adamson, are residents of Yavapai county, Territory of Arizona; appellee Wood, of Maricopa county in said Territory; and appellees Greene, Mitchell, and O'Keefe, of Cochise county, Arizona; and that appellee Costello is a resident of the city of Buffalo, State of New York.

II.

That appellants are now, and since a time prior to the commencement of this action have been, stockholders of appellee, Cobre Grande Copper Company; that appellant Hallenborg is the owner and holder of upwards of eight thousand (8,000) shares of said stock, and has been since July, 1900; that appellant A. Hicks is the owner and holder of five thousand (5000) shares of said stock and has been, since on or about July, 1900; that appellant Hallenborg is now, and at the commencement of this action was, a creditor of said company in the amount of upwards of fifty thousand ($50,000.00) dollars, exclusive of interest, represented by eight promissory notes made by the Cobre Grande Copper Company at various dates, all of which are overdue and unpaid.

III.

285 That prior to the 13th day of October, A. D. 1899, the Cobre Grande Copper Company had been in possession of certain valuable mining properties situated in the Cananea mountains, State of Sonora, Republic of Mexico, under and by virtue of certain contracts, agreements and deeds made by appellees William C. Greene and George Mitchell, or to which they were parties; and it was further in possession of a smelter and other property connected with said mines and mining properties, the whole being of great value, namely, upwards of one million ($1,000,000.00) dollars; that on or about the date last mentioned, the said William C. Greene

VII.

That, on April 3, 1901, the above-named directors of the Cobre Grande Copper Company held a meeting, at which, in pursuance of the agreement of December 12, 1900, a resolution was passed, turning over the entire conduct and management of the litigations and affairs of the Cobre Grande Copper Company to appellee William C. Greene; that, on or about the same date, a meeting of the stockholders of said company was also held, at which said contract was ratified; that the stockholders participating in this meeting held a majority of the stock of the Cobre Grande Copper Company; that thereupon, said directors and appellee Gage resigned as directors and officers of Cobre Grande Copper Company and other persons were elected in their places, and the note of twenty-three thousand ($23,000.00) dollars was surrendered to appellee J. H. Costello.

297 That, in pursuance of said agreement of December 12, 1900, and after appellee Greene had been appointed the agent of the Cobre Grande Copper Company as aforesaid, a certain appeal then pending in an action in Texas between the Cobre Grande Copper Company and certain defendants was dismissed.

VIII.

That the action out of which this appeal arose, was begun on January 3, A. D. 1901, by the appellants herein filing their complaint in the court below, and a preliminary injunction was issued in accordance with the prayer of said complaint restraining and enjoining defendants from carrying out and enforcing the agreement of December 12, 1900, and the supplemental agreement of December 14, 1900, and from discontinuing the actions then pending in behalf of the Cobre Grande Copper Company against defendants, and from discontinuing or dismissing the action then pending and which had been submitted for decision in the third district court of Maricopa county, and enjoining and restraining the Phœnix national bank from delivering certain deeds to the mining properties in dispute held by it in escrow; that said injunction was served on appellees, Corbre Grande Copper Company, William C. Greene, Cananea Consolidated Copper Company, Greene Consolidated Copper Company, Phœnix National Bank and others, on April 11, 12 and 13, 1901.

Thereafter, the Maricopa County case was resubmitted to
298 the court and a decision asked therein. Upon April 15, 1901, the court made and rendered its decision against the Cobre Grande Copper Company and in favor of the defendants and ordered the Phœnix national bank to return to William C. Greene, the deeds then held by it in escrow as aforesaid.

IX.

That the case out of which this appeal arose, was tried by the court below, sitting without a jury, on May 12, 13, 14 and 15, 1902,

and on September 18, 1902, the court made and rendered its decision in writing, in favor of appellees and against appellants, which decision was based upon the grounds,—(1), that as the case stood, it was one for the appointment of a receiver of the Cobre Grande Copper Company; (2), that, under the case presented at the hearing, an injunction could afford plaintiff no relief; (3), that the only purpose for which a receiver might be appointed, would be that of instituting proceedings to reinstate the Cobre Grande Copper Company as a litigant, in the situation it was at the time of the execution of the agreement of December 12, 1900; (4), that there was sufficient doubt of the power of the court to appoint a receiver where no other relief was asked for, to prevent its doing so, except in a case where plaintiffs were without other adequate remedy; (5), that plaintiffs had an adequate remedy by instituting suit in their own behalf as minority stockholders.

299 X.

That, in pursuance of the agreement of December 12, 1900, and the agreement supplemental thereto, appellee E. B. Gage received from appellees Greene and Greene Consolidated Copper Company, the sum of fifty thousand ($50,000.00) dollars in cash for his personal use and benefit; that in pursuance of said agreement and the supplemental agreement, fifty thousand ($50,000.00) dollars in cash was paid by appellees Greene and Greene Consolidated Copper Company to Messrs. L. H. Chalmers, Baker & Bennett, and Herndon & Norris, who, prior to that time, had been the attorneys for the Cobre Grande Copper Company in its various litigations with the Greene interests.

XI.

That the resubmission of the action brought by the Cobre Grande Copper Company in the district court of Maricopa county as aforesaid, was had after appellee Greene had become president of the Cobre Grande Copper Company and after a new board of directors, friendly to Greene and the Greene interests, had been elected, and that said resubmission was made after service had been had of the preliminary injunction issued in the present action upon appellees, Cobre Grande Copper Company, Phœnix National Bank, Mitchell, Gage, Adamson, O'Keefe, and Wood, and that, upon the date of said resubmission, similar service was had upon appellees Greene, Cananea Consolidated Copper Company and Greene Consolidated
300 Copper Company; that said resubmission and the subsequent decision in said case, on April 15, 1901, were had, made, and rendered at a time when appellee Greene and the Greene interests dominated both sides of said case and when there was no real controversy or issue between the parties thereto.

XII.

That the note of appellee J. H. Costello, provided to be, and which was, surrendered to him under the agreement of December 12, 1900, was conditioned to be payable ninety days after the Cobre Grande Copper Company had recovered possession of its properties in Mexico, with which properties this litigation was concerned.

XIII.

That the temporary restraining order granted in this action, enjoining appellees from carrying out the terms and provisions of the contract of December 12, 1900, and enjoining appellee Phœnix National Bank from delivering up any of the papers and documents held by it in escrow, evidencing the title of the Cobre Grande Copper Company in and to the mining property described in the complaint, was subsequently modified, and that the part of it enjoining Phœnix national bank, was dissolved upon the ground that the district court in and for Maricopa county had rendered its decision in the aforesaid suit pending before it in behalf of the Cobre Grande Copper Company, adversely to said Cobre Grande Copper
301 Company, and as a part of said decision, it ordered the Phœnix national bank to deliver up said papers and documents to appellee Greene.

XIV.

That the aforesaid resubmission of the suit in the district court of Maricopa county was had and made upon the tacit understanding between the parties thereto, that the issues in said case should be found in favor of the defendants and judgment entered against the plaintiff, The Cobre Grande Copper Company, dismissing plaintiff's said complaint and rendering judgment in favor of the said defendants; and that the judgment rendered in pursuance of said resubmission as above referred to, has never been appealed from, now has any step been taken to review the same in appellate proceedings.

Respectfully submitted,

ATWATER & CRUIKSHANK,
J. F. WILSON,
HAWKINS, ROSS & ANDERSON,
Attorneys for Appellants.

The foregoing findings in the nature of a special verdict, presented this day to me by the appellants, are refused, for the reason that, as the judgment of the supreme court of this Territory in this case is a general affirmance of the judgment of the court below, the
302 findings of the district court are the findings in the nature of a special verdict properly to be considered upon the appeal to the Supreme Court of the United States.

EDWARD KENT,
Chief Justice of the Supreme Court of Arizona

Upon the request of the appellants for some findings in this court, the findings of the court below are formally made the findings of this court in the nature of a special verdict. Such findings are as follows:

I.

The court finds that the defendant Cobre Grande Copper Company is now and was at the time of the commencement of this action, a corporation organized under the laws of the Territory of Arizona having its principal office at Phœnix, in said Territory. That its capital stock was $500,000. divided into 200,000 shares of $2.50 each.

That the defendant E. B. Gage was a director and president of the Cobre Grande Copper Company from and prior to December 12th, 1900, up to April 3rd, 1901, at which time he resigned as such director and president and his resignation was accepted, and since that time he has not been connected with said corporation.

That defendants Adamson, Costello, Wood and O'Keefe were directors of said Cobre Grande Copper Company from and prior
303 to December 12th, 1900, until April 3rd, 1901, at which time they resigned as directors and their successors were elected and qualified and that they have had no connection with said company since that date.

That defendant Wood was secretary of the said Cobre Grande Copper Company from and prior to December 12th, 1900, up to about April, 1901, at which time he resigned as such secretary and has had no connection with said company since that date.

That the defendant Phœnix National Bank, of Phœnix, Arizona Territory, was, at the time this action was commenced, and is now, a corporation organized under the laws of the United States and having its principal place of business in said Territory.

That the defendant Cananea Consolidated Copper Company is a corporation organized under the laws of the State of Sonora, Republic of Mexico.

That the Greene Consolidated Copper Company is a corporation organized under the laws of the State of West Virginia, and that defendant Greene is now and has been since prior to January 1st 1900, the president of said last-named corporation and a stockholder therein.

II.

That plaintiff Hallenborg is now and was at the time this
304 action was commenced, a stockholder in said Cobre Grande Copper Company, and owns 8,000 shares of the stock of said company, and has since June 15th, 1900.

That plaintiff Addicks is now and was at the time this action was commenced, owner and holder of 5,000 shares of the stock of the said Cobre Grande Copper Company.

That plaintiff Hallenborg was at the time this action was commenced and is now the owner and holder of the promissory notes

set out in paragraph two of plaintiff's complaint, and that he is resident of the city and county and State of New York.

That plaintiff Addicks is a resident of the State of Delaware.

That defendants Gage and Adamson are residents of Yavapa county, Arizona Territory. Defendant Wood, of Maricopa county Arizona. Defendants Greene, Mitchell and O'Keefe, of Cochi county, Arizona.

III.

That since prior to January 1st, 1900, the Cobre Grande Copp Company had been engaged in a series of lawsuits with the defen ants Mitchell and Greene and their associates, in the State of Sonor Republic of Mexico, in the third judicial district of the Territory Arizona in and for the county of Maricopa, and in the district cou of the 34th judicial district of the State of Texas in El Paso count Texas, and in the State of New York as hereinafter specifically forth.

305 That there was filed and instituted in the district court the third judicial district of the Territory of Arizona in a for Maricopa county on the 25th day of November, 1899, a certa suit wherein The Cobre Grande Copper Company was plaintiff a William C. Greene, George Mitchell and The Phœnix National Ba were defendants, No. 3437 on the docket of said court. In said s the Cobre Grande Copper Company alleged, among other things, substance, all the facts set forth in paragraph three of plainti original complaint on file in this action, and prayed that said Gre be required to account to the said Cobre Grande Copper Compa for the proceeds of the products of said mines and mining cla mentioned and described in plaintiff's complaint, together with supplies, material and property of said Cobre Grande Copper C pany alleged to have been taken and appropriated by him. T answers thereto were filed by the defendants in said action issues joined thereon.

That said cause came on for trial on the issues involved and cause was finally submitted to said court for decision and ju ment.

That afterwards, on April 15th, 1901, said court having f considered the cause and the allegations and the evidence, fo the issues for the defendants and entered judgment dismis plaintiff's complaint.

The court further finds that said judgment so rend

306 by said court has not been appealed from nor taken up to appellate court of the Territory of Arizona by any wri error or other proceedings.

The court further finds that at the time the said judgment decree was made and entered in Maricopa county and for a time prior thereto, the plaintiffs herein were stockholders in Cobre Grande Copper Company.

IV.

The court further finds that about the month of November, 1898, and prior thereto, defendant Greene owned certain property in Sonora, Mexico, and had options to purchase other properties there, being same mentioned in plaintiffs' complaint in this action.

That in said month of November, 1898, said Greene executed an option on the property then owned by him in Sonora and the other property for which he had contracts to purchase, to defendant Mitchell.

That said option provided that said Mitchell should pay in cash at the execution of said contract, $12,500.00 and $237,500 as follows: $37,500.00 to be paid on or before November 26th, 1899; $100,000.00 on or before November 26th, 1901.

That thereafter about the month of April, 1899, said Greene and Mitchell with the assistance of other parties, organized the
307 Cobre Grande Copper Company under the laws of Arizona.

That 199,995 shares of the stock of the said Cobre Grande Copper Company were turned over to the defendant Mitchell in consideration of his option from Greene, which said option between Greene and Mitchell was assigned to the Cobre Grande Copper Company subject to the rights of said Greene therein.

That the Cobre Grande Copper Company thereupon entered upon and into said property and began to operate the same, and was in possession in September, 1899.

That on or about the month of October, 1899, controversies arose between the Cobre Grande Copper Company and the defendant Greene over said option and the right of possession to said mining property, and that *on* or about that time said Greene entered into possession of said property.

That thereupon the Cobre Grande Copper Company instituted a suit in the courts of Sonora, Republic of Mexico, to gain possession of said property, and also instituted the suit in the district court of Maricopa county, Arizona, No. 3437 above referred to, to restrain the delivery to said Greene of the deeds which were put in escrow under said contract with Mitchell and thereafter assigned to the Cobre Grande Copper Company.

That under the last named suit a temporary injunction was granted, restraining the Phœnix National Bank as escrow agent of the parties, from delivering the said escrow papers and also
308 restraining defendant Greene from demanding or receiving the same from said bank.

V.

That while said litigation was in progress, the stockholders of the Cobre Grande Copper Company, or a majority thereof, comprising stockholders to the extent of 115,949 shares or thereabouts, entered into a pooling arrangement or arrangement whereby all of their stock,

came into the possession of the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company, or one of them.

IV.

That thereupon, appellee, Cobre Grande Copper Company, became engaged in a series of lawsuits with appellees Greene, Mitchell, Greene Consolidated Copper Company, and Cananea Consolidated Copper Company, arising out of the claims of the Cobre Grande Copper Company to the said properties and the repossession thereof, and out of its claims to the copper matte product of said mines.

That, on or about the 25th day of November, A. D. 1899, there was filed and instituted in the district court of the third judicial district of the Territory of Arizona, in and for the county of Maricopa, a certain suit, wherein the Cobre Grande Copper Com-
286 pany was plaintiff and William C. Greene, George Mitchell and The Phœnix National Bank were defendants, in the complaint in which suit, the Cobre Grande Copper Company alleged, among other things, substantially the facts set forth in plaintiff's original complaint on file in this action, and sought to prevent the delivery to said Greene, Mitchell and others, of certain deeds to the said mining properties then held in escrow by the Phœnix national bank, and also to secure and accounting from said defendants for the product of said mines and mining properties, together with the supplies, materials, and property of Cobre Grande Copper Company, alleged to have been appropriated by said defendants. That said suits, together with the suit last mentioned, were the result of meritorious efforts on the part of said Cobre Grande Copper Company to recover and defend said properties and were duly authorized and *bona fide*.

That, on October 23, A. D., 1900, said last mentioned suit came on for trial in the district court of Maricopa county and after a hearing covering many days, the same was submitted to the court and by it, taken under advisement.

V.

That, on October 24, A, D. 1900, and while the trial of the above mentioned case was in progress, a number of the stockholders of the Cobre Grande Copper Company, appellant Hallenborg among them, pooled their stock in said company, amounting to one hun-
287 dred fifteen thousand and forty-nine (115,049) shares, in the hands of appellee Gage as trustee; that, on December 12, A. D., 1900, after the trial of said case was completed and while the same was being held under advisement by the court, William C. Greene and the Greene Consolidated Copper Company, by William C. Greene, its president, as parties of the first part, and E. B. Gage and Cobre Grande Copper Company, by E. B. Gage, as president, as parties of the second part, made and entered into the following contract and agreement:

This memorandum of agreement, made and entered into this 12th day of December, A. D., 1900, by and between William C. Greene, of Bisbee, Arizona, and the Greene Consolidated Copper Company by William C. Greene, its president, duly authorized to represent it in this behalf, parties of the first part, and E. B. Gage, of Prescott, Arizona, and the Cobre Grande Copper Company, a corporation, by E. B. Gage, its president, parties of the second part, witnesseth:

That whereas, E. B. Gage, one of the parties of the second part, is the owner of 115,049 shares of the capital stock of the Cobre Grande Copper Company, a corporation organized under and by virtue of the laws of the Territory of Arizona, holding the same as trustee for certain stockholders of said Cobre Grande Copper Company, with power to dispose of the same and to act in their behalf,
288 with the terms of which power first parties are familiar;

Now, the parties of the first part hereby agree to become the purchasers of the said shares of stock for and in consideration of two dollars and fifty cents ($2.50) per share and for the further considerations as hereinafter expressed. The said parties of the first part pay on the execution of this contract fifty cents per share for the said stock. The next instalment of one dollar per share shall be paid within thirty days from this date, provided that if the parties of the first part shall not get the proceeds of certain matte, now in litigation in the State of New York within the said thirty days, then they shall have twenty (20) days more in which to pay said instalment of one dollar per share to the said E. B. Gage. The last instalment of one dollar per share is to be paid by the parties of the first part to the said E. B. Gage of the second part on or before sixty days after the said payment of the said second instalment aforesaid.

The said parties of the first part shall on or before the time of the payment of the last instalment as aforesaid, pay or cause to be paid to the said E. B. Gage of the second part, twenty-five thousand dollars ($25,000) in cash in addition to the two dollars and fifty cents ($2.50) per share.

In addition to the foregoing payment at the same time last aforesaid, the said parties of the first part shall pay or cause to be paid to the said E. B. Gage of the second part, thirty thousand
289 dollars ($30,000) in cash.

And in addition to the foregoing payments the parties of the first part shall deliver to the said E. B. Gage of the second part, at the last time aforesaid, properly transferred, three thousand (3,000) shares of the capital stock of the Greene Consolidated Copper Company, or the parties of the first part shall have the option in lieu of the delivery of the said three thousand (3,000) shares of stock to pay or cause to be paid at the same time to E. B. Gage of the second part, thirty thousand dollars ($30,000) in cash.

The said E. B. Gage of the second part shall have the privilege in lieu of the said two dollars and fifty cents ($2.50) per share for the said shares of stock of the Cobre Grande Copper Company, of

exchanging all or any part of said shares with the parties of the first part for stock of the Greene Consolidated Copper Company upon the terms of four shares (4) of Cobre Grande Copper Company stock for one share of Greene Consolidated Copper Company stock, the said option to be exercised any time before the second payment as aforesaid, and in case of said exchange of stock the amount already paid thereon shall be refunded.

The said parties of the first part, in addition to the foregoing, hereby agree at the time of the last payment aforesaid, to deliver to E. B. Gage of the second part, duly transferred, five thousand
290 (5,000) shares of said stock for the use and benefit of L. H. Chalmers, Baker & Bennett and Herndon & Norris, attorneys-at-law in the Territory of Arizona.

It is also agreed by the Cobre Grande Copper Company that a certain promissory note now in the hands of P. Sandoval & Company, given by J. H. Costello to the Cobre Grande Copper Company, for the sum of twenty-three thousand ($23,000) dollars shall be by the said Cobre Grande Copper Company surrendered to said J. H. Costello.

It is also agreed that all suits to which the Cobre Grande Copper Company is a party, now pending in the State of New York, shall be dismissed, each party paying his own costs, and all bonds given in said suits of any kind and character shall be discharged and the sureties thereon relieved from liability.

It is further agreed that the cause now pending in Cochise county, Arizona, brought by Isabella Chase and others against the Cobre Grande Copper Company shall be dismissed on the same terms.

It is further agreed that a suit in El Paso, Texas, now pending on appeal to the supreme court of the State of Texas, shall be disposed of as follows: The appeal perfected by the said Cobre Grande Copper Company shall be dismissed and the suit in the district court also shall be dismissed upon the terms that each party shall pay his own costs.

It is also agreed that the two suits in the district court of
291 the county of Maricopa, in the Territory of Arizona, which have been submitted to the court for decision, that the order of submission shall, by consent, be set aside, and when the final payment above provided for shall have been made, it is agreed that those suits shall be dismissed upon the same terms.

It is also agreed that any stockholders who are represented by the said E. B. Gage as owners of the said 115,049 shares of Cobre Grande Company stock may withdraw their stock from this agreement, if they wish to do so, provided that the said E. B. Gage shall be required to transfer at least 51,000 shares hereunder.

It is further agreed that the parties of the second part will do all things in their power to accomplish the results that the matte, or proceeds thereof, now in litigation in New York, shall be as quickly as possible turned over and delivered to the parties of the first part,

whether the same be now in the shape of matte or in money, the proceeds of the matte.

It is further agreed that all suits now pending in the State of New York between J. H. Costello and William C. Greene, or the Greene Consolidated Copper Company, shall also be dismissed, each party paying his own costs.

It is further agreed that if the first parties fail to make any
292 of the payments above provided, at the times above named, that the amount theretofore paid by them shall be and continue the absolute property of E. B. Gage of the second part and first parties shall have no right to recover the same or any part thereof, and said Gage shall distribute the money paid him thereunder to the parties entitled thereto as the same shall be paid to him.

It is further agreed that the present directors of the Cobre Grande Copper Company, to-wit: E. B. Gage, W. M. Adamson, J. H. Costello, J. Henry Wood and Con O'Keefe shall file with this contract their written resignation as directors and officers of said Cobre Grande Copper Company, and if this contract is carried out on the part of the first parties, then said resignations shall remain in full force and effect, otherwise they shall be withdrawn.

It is further agreed that in order to carry out this contract, the said 115,049 shares of Cobre Grande copper stock, now owned and held by said E. B. Gage of said second part, shall be placed in escrow with the Phœnix National Bank at Phœnix, Arizona; and said bank shall act as the escrow agent of the parties hereto, and upon the parties of the first part fully complying with the terms of this contract on their part, said bank is hereby authorized and directed to deliver all of said stock to the said parties of the first part, but should the said parties of the first part, fail, neglect or refuse to make any of the payments herein provided at the times or
293 time hereinbefore specified, or shall fail, neglect or refuse to carry out any of the terms of this contract, then the said Phœnix National Bank is hereby authorized and directed to return this contract with the stock and all papers placed in escrow herewith to the said E. B. Gage, trustee. Time is made the essence of this contract.

This contract shall be binding upon the parties hereto, their heirs, successors and assigns.

It is understood that certain clause hereinabove written, providing for the dismissal of suits in New York between J. H. Costello and W. C. Greene and the Greene Consolidated Copper Company, shall cover all suits to which they are parties and arising out of Cobre Grande matters.

In witness whereof, the parties hereto have set their hands and

seals and caused these presents to be signed the day and year above written.

W. C. GREENE.
GREENE CONSOLIDATED COPPER CO.,
By W. C. GREENE, Pres.
E. B. GAGE, Trustee.
THE COBRE GRANDE COPPER CO.,
By E. B. GAGE, Pres.

I hereby ratify the foregoing contract, in so far as the same applies to me.

J. H. COSTELLO.

293½ That thereafter, to-wit, on the 14th day of December, A. D. 1900, the parties to the foregoing agreement made and executed the following agreement, supplemental to that of December 12, A. D. 1900, as above set out:

This supplemental agreement made this 14th day of December, A. D. 1900, by and between William C. Greene of Bisbee, Arizona, and the Greene Consolidated Copper Company, by William C. Greene, its president, duly authorized to represent it in this behalf, parties of the first part, and E. B. Gage of Prescott, Arizona, and the Cobre Grande Copper Company, a corporation, by E. B. Gage, its president, parties of the second part, witnesseth:

That whereas, on the 12th day of December, 1900, a contract was entered into by the parties hereto, which said contract has been ratified at a directors' meeting of the Cobre Grande Copper Company, and

Whereas, in said original contract it was provided that the second payment of one ($1) dollar per share for the stock of the Cobre Grande Copper Company should be paid in thirty (30) days from December 12, 1900, and further provided that in case certain suits now pending in New York were not dismissed, or the proceeds realized from certain matte in controversy in said suits, that said parties of the first part shall have twenty (20) days further time in which to make said second payment, and

294 Whereas, difficulties have arisen about the dismissal of said New York suits and about realizing the matte or the proceeds thereof, to the said first parties;

Now, therefore, in consideration of the premises and of the sum of one ($1) dollar by each paid to the other party, the receipt of which is acknowledged, this supplemental agreement, witnesseth:

That if said suits are not dismissed and the proceeds of said matte not realized by the said first parties within the said period fixed in said original agreement for the second payment, then said first parties shall have twenty (20) days additional time in which to make said second payment, that is to say, seventy (70) days from the 12th day of December, 1900.

It is further agreed that that clause in the contract relative to the two suits now pending in the district court of the county of Maricopa, Arizona, and which are now submitted to the court for decision, be modified by adding to said clause the following:

That if said contract is not carried out and said money paid according to the terms of said contract, that then said suits shall be resubmitted to the court for decision, without further testimony or argument.

Witness the hands and seals of the parties this the day and year first above written.

WILLIAM C. GREENE. [SEAL.]

295 GREENE CONSOLIDATED COPPER CO.,
By W. C. GREENE, Pres. [SEAL.]
E. B. GAGE. [SEAL.]
COBRE GRANDE COPPER CO.,
By E. B. GAGE, Pres. [SEAL.]

That said agreement of December 12, 1900, was ratified by appellee J. H. Costello, in so far as it concerned him, and that the said J. H. Costello was at that time indebted to the Cobre Grande Copper Company in the sum of twenty-three thousand ($23,000.00) dollars and a director of said company.

VI.

That the stock of the Cobre Grande Copper Company then owned by appellant Addicks, was not included in the stock placed in the hands of E. B. Gage as trustee; that when appellant Hallenborg was notified of the contract of December 12, 1900, above set out, he refused to abide by the same and protested against said contract and the proceedings taken thereunder, and that, at the meeting of the stockholders subsequently held for the purpose of carrying out the provisions of said contract as hereinafter set forth, appellant Hallenborg was present by his attorney, and protested against said proceedings.

That, on December 29, A. D., 1900, appellant Hallenborg filed a petition in the district court of the third judicial district, asking leave to intervene in the above mentioned case of Cobre Grande Copper Company against W. C. Greene, *et al.*, in which said

296 petition, appellant Hallenborg sought permission to become a party to said action, on the ground that he was a creditor of the Cobre Grande Copper Company and a stockholder thereof, as is set forth in the complaint in this action; that said petition for intervention was denied by said court upon the ground that petitioner was not interested in the subject matter of the suit and that the petition came too late, from which decision an appeal was taken to this court and upon hearing, said appeal was dismissed upon the ground that it was not taken from an appealable order.

324 STATE OF NEW YORK, } ss.:
County of New York, }

I, George E. Hayes, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof, as recorded in the minute book of the said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said resolution.

Given under my hand and the seal of the company, at the city of New York, this 16th day of April 1904.

[CORPORATION SEAL.] GEORGE E. HAYES,
Attorney-in-fact.

Statement of the United States Fidelity and Guaranty Company, Rendered to the Department of Justice, Washington, D. C., at the Close of Business, February 29th, 1904.

Assets:

Investments, stocks and bonds (market value)	$1,877,523.80
Cash on hand and in banks	234,241.80
Collateral loans	49,140.00
Real estate	441,729.11
Loans on mortgages	19,650.00
Mortgages and other collateral a/c salvage	4,000.00
Agents' balances, fidelity & surety, less commissions	300,391.49
Agents' balances, burglary, less commissions	76,666.21
Due from subscriptions, dept. guaranteed attorneys	33,133.60
Advanced a/c contracts secured	131,821.48
Interest due and accrued	18,962.53
	$3,187,260.02

Liabilities:

Capital stock, paid in cash	$1,700,000.00
Cash deposited as security for risks	90,311.96
Surplus and reserve	1,396,948.06
	$3,187,260.02

325 STATE OF NEW YORK, } ss.:
County of New York, }

George E. Hayes, being duly sworn, says that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, and that, to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said company, as of February 29th, 1904, and that the financial condition of said company is as favorable now as it was when such statement was made.

GEORGE E. HAYES.

Subscribed and sworn to before me this 16th day of April, 1904.

ALONZO G. OAKLEY,
Commissioner of Deeds, New York City.

(Endorsed:) In the supreme court of the Territory of Arizona. Axel W. Hallenborg and J. Edward Addicks, appellants, *versus* Cobre Grande Copper Company, a corporation, *et al.*, appellees. Appeal bond. Filed May 16, 1904. S. M. Cullom, clerk. Atwater & Cruikshank, J. F. Wilson, Hawkins, Ross & Anderson, attorneys for appellants.

326 In the Supreme Court of the Territory of Arizona.

AXEL W. HALLENBORG and J. EDWARD Addicks, Appellants, *versus* COBRE GRANDE COPPER COMPANY ET AL., Appellees.	No. 822. Assignment of Errors.

For the Consideration of the Supreme Court of the United States.

Come now appellants and assign the following errors as having been committed by the supreme court of the Territory of Arizona in its judgment affirming the decision of the trial court appealed from and its order denying appellants' motion for rehearing of their appeal, upon which errors appellants rely for a reversal of the judgment and order appealed from:

First. The court erred in failing to reverse the judgment appealed from for the error of the lower court in permitting appellees, over appellants' objections, to introduce in evidence and in considering the same the stenegrapher's notes taken by the stenographer of the third judicial district of the Territory of Arizona at another and different trial pertaining to some of the matters being litigated in this cause, for the reasons:

(*a.*) That the action was between different parties than
327 those in the present action;

(*b.*) That the record in that case contains a transcript of the evidence which could not under any circumstances be evidence in the case at bar;

(*c.*) That the judgment in that case was rendered subsequent to the bringing of the present action and therefore inadmissible;

(*d.*) That said judgment was rendered subsequent to the execution of the contract of December 12, 1900, and after W. C. Greene, the enemy of the Cobre Grande Copper Company and its general adversary, had obtained control of both sides of the litigation in all actions between himself and the Cobre Grande Copper Company.

Second. The court erred in failing to reverse the judgment appealed from for error of the trial court in admitting and considering

the judgment roll of the thirty-fourth judicial district of the State of Texas as evidence in this case, over the objections of appellants, for the reasons set forth in the first assignment of error.

Third. The court erred in failing to reverse the judgment appealed from for error of the trial court in admitting and considering as evidence in this cause, over the objections of appellants, a power of attorney to E. B. Gage, of date October 24, 1900, for the
328 reason that the same was wholly irrelevant and immaterial.

Fourth. The court erred in failing to reverse the judgment appealed from for error of the trial court in admitting and considering as evidence in this action, over the objection of appellants, the agreement between Benjamin Orne and E. B. Gage, of date January 5, 1900, because the same was irrelevant, incompetent, and immaterial.

Fifth. The court erred in failing to reverse the judgment appealed from for the error of the trial court in permitting E. B. Gage, over the objection of appellants, to answer the following question while on the stand testifying on behalf of himself and other appellees, to-wit: Q. Referring to the agreement of December 12, 1900, will you state what the amount of twenty-five thousand ($25,000.00) dollars and the two amounts of thirty thousand ($30,000.00) dollars therein mentioned, making eighty-five thousand ($85,000.00) dollars, was for? for the reason that said contract is unambiguous and speaks for itself, and that the question called for a conclusion of the witness.

Sixth. The court erred in failing to reverse the judgment appealed from, on account of error of the trial court in admitting and considering as evidence in this action, over the objections of appellants, an unsigned agreement of November 1900, because
329 the same was clearly immaterial and was to the injury of appellants' rights herein.

Seventh. The court erred in affirming the judgment of the trial court and in denying to appellants the relief asked by them, for the reason that, under the evidence adduced on the trial, appellants were entitled to such relief in a court of equity, and for the further reason that the judgment of the trial court was unsupported by and in conflict with said evidence.

Eighth. The court erred in not finding and decreeing that the contract of December 12, 1900, and all acts of the appellees thereunder and in pursuance thereof, were in violation of appellants' rights and in conflict of the same, and entitled them to relief in a court of equity as prayed for, and further, in failing to hold that said agreement was fraudulent, illegal and void as to appellants and the Cobre Grande Copper Company, for the reasons:

(*a.*) That the same was entered into without the consent and over the objections of appellants;

(*b.*) Because said contract made no provision whatever for the creditors of said Cobre Grande Copper Company or for its minority stockholders or for appellants or either of them;

(*c.*) Because said contract was wholly without consideration re-

sulting to Cobre Grande Copper Company, although its purpose and intended effect was to strip said Cobre Grande Copper Com-
330 pany of all its rights, titles and interests in and to the mining properties in dispute, and to leave it without any assets of any description whatever;

(*d.*) Because said contract was for the purpose of surrendering the entire property and assets of said Cobre Grande Copper Company to its enemies and adversaries, without consideration, and for the purpose of depriving appellants of all interests in said company and all of their remedies against said company, without any consideration whatever moving to them;

(*e.*) Because said contract is a stipulation on the part of the majority of the directors of the Cobre Grande Copper Company, for considerations and benefits resulting to themselves individually, to turn over to the enemies and adversaries of said company all of its property and the entire control of said company, without any consideration moving to said company;

(*f.*) Because on the face of said contract, it appears that by the payment of certain sums to the officers and directors of Cobre Grande Copper Company, the enemies and adversaries of said company are enabled to control both sides of all litigations pending between themselves and said company and to fill the offices of said company with their own agents;

(*g.*) Because said contract was *ultra vires* in that it involved the sale of all the property of said Cobre Grande Copper Company without the consent of all of its stockholders, and that the sale
331 was made, not for the purpose of dissolving the company, but for the purpose of delivering and transferring the same and its control to its enemies and adversaries.

Ninth. The court erred in failing to hold that the court below had power under the statutes of Arizona and by virtue of its chancery powers, to appoint a receiver of the Cobre Grande Copper Company under the evidence in this case, and in refusing to reverse the judgment of the lower court and direct the appointment of such receiver for the reasons:

(*a.*) That the appointment of such receiver is within the chancery powers of the district courts of Arizona, independent of statutory authority;

(*b.*) That such power rests in said courts, especially in a case of fraud or mismanagement by the officers, directors or majority stockholders of a corporation inimical to its interests, as appears in the case at bar;

(*c.*) That, under the facts proven in this case, the appointment of such a receiver offers the only adequate remedy for the wrongs of which they complain.

Tenth. The court erred in refusing and failing to hold that the judgment made and entered by the district court of Maricopa county in favor of the Greene interests and against the Cobre Grande Copper Company was a nullity which should not be allowed to

stand between appellants and their rights and remedies, for the reasons:

332 (*a.*) That said judgment was entered in a cause at a time when there was no real controversy therein or before the court, and when both sides of the case were controlled and dominated by appellee Greene and his associates;

(*b.*) That said judgment was entered in pursuance of the agreement of December 12, 1900, and was therefore, for the reasons hereinbefore set forth, collusive, fraudulent, and void as to these appellants.

Eleventh. The court erred in holding that the only question presented to the trial court in this case and to said court on this appeal was as to the appointment of a receiver of the Cobre Grande Copper Company, for the reasons:

(*a.*) That, under the pleadings and proof in this case, the court might properly and should have passed upon the validity of the agreement of December 12, 1900, as above referred to;

(*b.*) That, under said pleadings and proof, the court might properly and should have passed upon the validity of the Maricopa County judgmen and decree that the same was absolutely void, and furthermore, that the deeds delivered to appellee Greene by the Phœnix national bank in obedience to said judgment, should be forthwith returned to said bank;

(*c.*) That, under said pleadings and proof, the court might properly and should have ordered and decreed that the time for the payment by the Cobre Grande Copper Company of the instalment of thirty-seven thousand five hundred ($37,500.00) dollars

333 and all other instalments on its contract for the mines in controversy, be extended to a reasonable time after its restoration to possession of said mines;

(*d.*) That, under said pleadings and proof, the court might properly and should have passed upon the rights of appellants to an accounting to the Cobre Grande Copper Company and to them from appellees Greene, Cananea Consolidated Copper Company, and Greene Consolidated Copper Company, for the property of said Cobre Grande Copper Company, including the product of said mines taken or appropriated by them.

Twelfth. The court erred in holding that the trial court committed no abuse of discretion in refusing to appoint a receiver as prayed for in appellants' complaint, for the reason that the evidence in the cause made a clear case for such appointment, and furthermore, a case in which the grievances of appellants could not be adequately remedied otherwise than by the appointment of such receiver.

Thirteenth. The court erred in affirming the judgment appealed from and in failing to hold that in spite of the change of conditions subsequent to the filing of *of* appellants' complaint, they were entitled to full relief under the conditions proven and to have the deeds which were delivered to appellee Greene in pursuance of the

334 Maricopa judgment and in furtherance of the agreement of

December 12, 1900, ordered to be returned to the Phœnix national bank to await the determination of this litigation.

Fourteenth. That the court erred in holding that appellants are not entitled to the appointment of a receiver because they have an adequate remedy in an action prosecuted in their own behalf as minority stockholders, for the reasons:

(*a.*) That the existence of such other remedy, if it exists, is no bar to appellants' election of their remedy through a receivership, especially where it appears, as in the case at bar, that the remedy through a receivership is a more adequate and complete remedy;

(*b.*) That the remedy pointed out by the court is not an adequate remedy for the wrongs and grievances complained of and provided by appellants;

(*c.*) That equity having once taken jurisdiction of a cause, should render such relief as appears proper from the proof, and appellants should not be forced to abandon their present proceeding in equity and institute another proceeding in equity.

Fifteenth. That the court erred in refusing to reverse the judgment appealed from and to order the appointment of a receiver as prayed for upon the ground of possible harm which might accrue to the Cobre Grande Copper Company through the appointment of such receiver, for the reasons:

335 (*a.*) That it appears from the evidence that said company at the present time is in the control of its enemies, the Greene interests, who are its officers, directors and majority stockholders, and whose interests are adverse to the interests of said company;

(*b.*) That said company appears from the evidence to be without assets other than the choses in action sought to be enforced in this litigation.

(*c.*) That, at the present time, said company has merely a nominal existence and activity and could not therefore, or for the reasons above set out, suffer any damage or detriment from the appointment of such receiver.

Sixteenth. The court erred in failing to hold that the action of appellee Gage as president of the Cobre Grande Copper Company and as trustee of the stockholders of the same, in entering into and consummating the agreement of December 12, 1900, was fraudulent, collusive and void as to appellants and all others in like estate, for the reasons:

(*a.*) That the said actions of appellee Gage were induced by considerations resulting to him as an official of said company and as a trustee of said stockholders, and without any consideration resulting to said company or to said stockholders;

(*b.*) Because his said action, as shown by said contract on its face, was a bartering away of the office which he then held in said 336 company without consideration to the company or to the stockholders whom he represented, and for personal consideration to himself, none of which was provided for by the charter or by-laws of the company;

Thereupon said Gage took the matter up with said Greene and did, on the 12th day of December, 1900, enter into the contract of that date mentioned in plaintiff's original complaint filed in this action.

That after said contract was made, a meeting of the board of directors and a meeting of the stockholders of the Cobre Grande Copper Company was held and said contract was ratified in its entirety by said directors and by a majority vote of the stockholders at said meeting, said Hallenborg being present at the stockholders' meeting and protesting against the ratification of said contract.

That immediately upon the execution of said contract said Greene paid fifty cents per share for each of the shares represented in the pool aforesaid, including fifty cents for each share then held and owned by plaintiff Hallenborg.

That afterward said Greene complied with his contract and
313 paid up the full purchase price for the said stock, as agreed upon in the contract of December 12th, and the said stock was delivered to him and the Greene Consolidated Copper Company in accordance with said contract of December 12th, 1900.

That said stockholders accepted the money so paid to the said Gage and ratified said contract except plaintiff Hallenborg, who returned the money sent to him, and declined to be bound by said contract.

The court further finds that the contract of December 12th, 1900, was entered into by E. B. Gage in good faith with the full knowledge and consent of the directors of the Cobre Grande Copper Company and upon the advice of counsel of the Cobre Grande Copper Company that the company could not successfully maintain its suit, No. 3467, and with the belief on the part of said Gage that said contract was to the best interests of said company and its stockholders.

The court further finds that no agreement was made between Gage or any other persons whereby the directors Adamson, Wood, O'Keefe, or any of them, were to derive or did derive any benefit or gain whatsoever, except such benefits as they derived from the sale of their stock.

IX.

That the suits mentioned in plaintiff's complaint as pending in the State of New York are still pending.

That all other suits mentioned in plaintiff's complaint were
314 dismissed or otherwise disposed of by final judgment prior to this action.

That the $25,000 mentioned in the contract of December 12th, 1900, was for the purpose of taking up and discharging certain outstanding notes due and owing by the Cobre Grande Copper Company to its creditors.

That the $30,000 cash mentioned in said contract of December 12th, 1900, was for the purpose and it was intended by the parties

to be turned into the treasury of the Cobre Grande Copper Company to pay its debts.

That the 3,000 shares of the capital stock of the Greene Consolidated Copper Company mentioned in said contract, or the $30,000 which Greene had a right to pay in lieu thereof, together with the $30,000 last above mentioned, was intended by the parties to be paid into the treasury of the Cobre Grande Copper Company for the purpose of paying said company's indebtedness outside of the $25,000 in this finding last above mentioned, a portion of which indebtedness said Hallenborg claims in this action.

That the 5,000 shares of stock of the Greene Consolidated Copper Company mentioned in said contract of December 12th, 1900, agreed to be paid to said Gage was intended by all the parties as compensation to said Gage for services rendered by said Gage as president of the said Cobre Grande Copper Company and as compensa-
315 tion to him for the time, labor, trouble and attention given to said company's business and for money advanced to and for said company and expenses paid in attending to the affairs of said company and in connection therewith.

That the 5,000 shares of stock of the Greene Consolidated Copper Company mentioned in said contract of December 12th, 1900, as agreed to be paid to L. S. Chalmers, Baker & Bennett and Herndon & Norris, attorneys for the Cobre Grande Copper Company, was intended to be paid as compensation for their services rendered to said company in various litigations.

That the $25,000 intended for the purpose of taking up certain outstanding notes due to the creditors of the Cobre Grande Copper Company was paid by said Greene and used in paying said creditors.

That the $30,000 first mentioned in this paragraph was paid by said Greene to said Gage, and by him paid into the treasury of the Cobre Grande Copper Company.

That the 3,000 shares of the capital stock of the Greene Consolidated Copper Company mentioned in this paragraph, in lieu of which the said Greene had the option of paying $30,000, was paid in cash by said Greene to said Gage, and by him paid into the treasury of the Cobre Grande Copper Company.

That the 5,000 shares of stock which was intended as compensation to defendant Gage, was paid in cash, to-wit, the sum of $50,000.

That the 5,000 shares of stock of the Greene Consolidated
316 Copper Company mentioned in said contract of December 12th, 1900, as being intended to be paid to L. H. Chalmers, Baker & Bennett and Herndon & Norris, $50,000 was paid in cash in lieu thereof, and the same was distributed among said attorneys, and the proof tends to show that their services were reasonably worth said amount and there was no evidence to the contrary.

That the note of J. H. Costello mentioned in the contract of December 12th, 1900, was conditioned upon the Cobre Grande Copper Company obtaining possession of its property in Mexico; said note was not to be paid until ninety days after such recovery of posses-

sion. That the said note was turned over to said Costello as provided by the terms of said contract.

X.

The court further finds that the only property now in possession of the Cobre Grande Copper Company, within the jurisdiction of this court, is a certain sum of money held by the treasurer of said company which was paid to him as part of the proceeds of the agreement of December 13th, 1900.

XI.

The court further finds that the temporary restraining order granted in this action enjoining defendants from carrying out the terms and provisions of the contract of December 12th, 1900, and dismissing any and all of the actions then pending in behalf of
317 the Cobre Grande and enjoining defendant Phœnix National Bank from delivering up any of the papers and documents held by it in escrow evidencing the title held by the Cobre Grande Copper Company in and to the mining property described in the complaint, was modified, and the part of it enjoining the Phœnix National Bank was dissolved upon the ground that the district court in and for Maricopa county had rendered its decision in the suit of the Cobre Grande Copper Company against Greene and others adversely to said Cobre Grande Copper Company, and that as a part of the judgment of said court the Phœnix National Bank was commanded to deliver up said papers and documents to said defendant Greene, and that as this case now stands, there is nothing before the court except an application for the appointment of a receiver.

Dated this 16th day of May, A. D., 1904.

EDWARD KENT,
Chief Justice of the Supreme Court
of the Territory of Arizona.

(Endorsed:) No. 822. In the supreme court of the Territory of Arizona. Axel W. Hallenborg and J. Edward Addicks, appellants, *vs.* Cobre Grande Copper Company, a corporation, *et al.*, appellees. Statement of facts in the nature of a special verdict. Filed May 16, 1904. S. M. Cullom, clerk. Atwater & Cruikshank, J. F. Wilson, Hawkins, Ross & Anderson, attorneys for appellants.

318 In the Supreme Court of the Territory of Arizona.

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
versus
COBRE GRANDE COPPER COMPANY, a Corporation, ET AL., Appellees.

Petition for Appeal to the Supreme Court of the United States.

The above named appellants, Axel W. Hallenborg and J. Edward Addicks, conceiving themselves aggrieved by the final judgment of

the above entitled court, entered upon the final hearing of this appeal in said cause, on the 13th day of January A. D., 1904, in which the judgment of the district court of the fourth judicial district of the Territory of Arizona, in and for the county of Yavapai, was affirmed and in which said judgment, the said appellants were denied any remedy or relief; and said appellants conceiving themselves further aggrieved by the order of the above entitled court, made and entered on the 26th day of March A. D., 1904, denying the petition of said appellants for a rehearing of their said appeal, do hereby appeal from said orders to the Supreme Court of the United States and pray that this, their appeal, may be allowed and that a tran-
319 script of the record and proceedings and papers upon which said orders were made, may be duly authenticated and sent to the Supreme Court of the United States.

J. F. WILSON,
HAWKINS, ROSS & ANDERSON,
ATWATER & CRUIKSHANK,
Attorneys for Appellants.

And now, to-wit, on the 16th day of May A. D., 1904, it is ordered that the foregoing petition for appeal be granted and that the appeal as therein prayed for be allowed and the bond fixed at one thousand ($1000.00) dollars.

EDWARD KENT,
Chief Justice of the Supreme Court
of the Territory of Arizona.

No. 822. In the supreme court of the Territory of Arizona. Axel W. Hallenborg and J. Edward Addicks, appellants, *versus* Cobre Grande Copper Company, a corporation, *et al.*, appellees. Petition for appeal to the Supreme Court of the United States. Filed May 16, 1904. S. M. Cullom, clerk. Atwater & Cruikshank, J. F. Wilson, Hawkins, Ross & Anderson, attorneys for appellants.

320 In the Supreme Court of the Territory of Arizona.

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
versus
COBRE GRANDE COPPER COMPANY, a Corporation; E. B. GAGE, W. M. Adamson, John. H. Costello, J. Henry Wood, and Con O'Keefe, Directors; William C. Greene, George Mitchell, Phœnix National Bank, of Phœnix, Arizona, Cananea Consolidated Copper Company, Sociedad Anonima, and Greene Consolidated Copper Company, a Corporation, Appellees.

Know all men by these presents, that we, Axel W. Hallenborg and J. Edward Addicks, as principal, and The United States Fidelity and Guaranty Company, having an office and usual place of

business at No. 66 Liberty street, in the city of New York, as surety, *as surety*, are held and firmly bound unto the above named Cobre Grande Copper Company, a corporation, E. B. Gage, W. H. Adamson, John H. Costello, J. Henry Wood, and Con O'Keefe, directors; William C. Greene, George Mitchell, Phœnix National Bank, of Phœnix, Arizona, Cananea Consolidated Copper Company, Sociedad Anonima, and Greene Consolidated Copper Company, a corporation, in the sum of one thousand ($1000.00) dollars, for the faithful payment of which sum, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally and firmly by these presents, sealed with our seals and dated at New York city, the 16th day of April A. D., 1904.

321

Whereas, the above-bounden Axel W. Hallenborg and J. Edward Addicks, have prosecuted an appeal to the Supreme Court of the United States to reverse the judgment rendered in the above entitled case on the 13th day of January, A. D., 1904, by the supreme court of the Territory of Arizona, and also to reverse the decision and order of said court, made and entered on the 26th day of March, A. D. 1904, overruling and denying the petition of the said Axel W. Hallenborg and J. Edward Addicks for a rehearing of their above entitled appeal;

Now therefore, the condition of the above obligation is such that, if the above named Axel W. Hallenborg and J. Edward Addicks shall prosecute said appeal to effect and answer all costs if they fail to make said plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

AXEL W. HALLENBORG,
Per ATWATER & CRUIKSHANK,
His Attorneys.

J. EDWARD ADDICKS,
Per JNO. J. HAWKINS, His Attorney.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN,
Manager.

[CORPORATION SEAL.]

Attest: GEORGE E. HAYES,
Attorney in Fact.

322

The foregoing appeal bond taken and approved, this 16th day of May A. D., 1904.

EDWARD KENT,
Chief Justice of the Supreme Court of Arizona.

STATE OF NEW YORK, } ss:
County of New York, }

On this — day of —— 190–, personally appeared before me —— —— to me known and known to me to be the individual de-

scribed in and who executed the foregoing instrument and acknowledged to me that he executed the same.

——— ———,
Commissioner of Deeds, New York City.

STATE OF NEW YORK, }
County of New York, } ss.:

On the 16th day of April, in the year 1904, before me personally came Sylvester J. O'Sullivan, to me known, who, being by me duly sworn, did depose and say that he resided in the city of New York; that he was manager of the United States Fidelity and Guaranty Company, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascer-
323 tained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the year 1893. And the said Sylvester J. O'Sullivan, further said that he was acquainted with George E. Hayes, and knew him to be the attorney-in-fact of said company; that the signature of said George E. Hayes, subscribed to the within insrument, is in the genuine handwriting of said George E. Hayes, and was subscribed thereto by like order of the board of directors, and in presence of him, the said Sylvester J. O'Sullivan.

ALONZO G. OAKLEY,
Commissioner of Deeds, New York.

At a regular meeting of the board of directors of the United States Fidelity and Guaranty Company, duly called and held on the ninth day of November, A. D., 1903, at the office of the company, in the city of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved, That Andrew Freedman, vice-president, or Sylvester J. O'Sullivan, manager, or Leonidas Dennis, or Charles W. Young, or George E. Hayes, or W. C. Schryver, or Gilman Ashburner, or H. C. Nash, attorneys-in-fact of this company in the State of New York, be and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for, or on behalf of the company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and other undertakings required or permitted in all actions or proceedings or by law required; such bonds and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require.

to-wit, 115,049 shares, was delivered to the defendant E. B. Gage, with power to vote the same at all meetings of the stockholders.

That after said stock was pooled and while said pooling contract was in force, the stockholders therein represented granted to defendant E. B. Gage, who held said stock in said pool, the right to dispose of and sell said stock at his discretion.

That on January 5th, 1900, the said Gage as trustee, made and entered into a contract with one Benjamin Orne for the sale of said stock at $2.50 per share, a copy of which said contract is attached to defendants' first amended answer herein marked Exhibit 2 and made a part thereof.

VII.

That the said Orne failed to carry out the terms of said option on his part and failed to purchase said stock.

That on March 30th, 1900, the said Gage, trustee for stock,
309 with power to sell and dispose of the same entered into an agreement with L. H. Chalmers, agent, for the sale of 101,000 shares of the Cobre Grande Copper Company stock at the price of $2.50 per share, a copy of which said contract is attached to defendants' first amended answer marked Exhibit 3 and made a part thereof.

That in said contract the said Chalmers was acting as agent for Samuel Untermeyer of the city of New York, or in case the said Samuel Untermeyer refused to carry out the terms of said option, then such responsible party or parties that might be named by one James Shirley.

That said contract with said Chalmers lapsed on account of his failure and the failure of those whom he represented, to purchase said stock.

That on June 2nd, 1900, said Gage on behalf of said stockholders, entered into a second agreement with the said Chalmers as agent, for the sale of 101,000 shares of the capital stock of the Cobre Grande Copper Company at the price of $250,000.00 upon the terms and conditions named in said option, a copy of which said option is attached to defendants' first amended answer and marked Exhibit 4 and made a part thereof. And on the same day said Chalmers made written declaration that he was acting as the agent for one William H. Dowe of the city of New York, and his representatives; and on the same day said Dowe declared in writing that he was
acting for and representing John H. Costello, Axel W. Hal-
310 lenborg, plaintiff in this action, Henry H. Adams, James Shirley and Senator William F. Deboe.

That in consideration for said option said parties purchased, to-wit, about 16,000 shares of the stock of the Cobre Grande Copper Company and paid therefor $2.50 per share.

That said contract was not complied with on the part of said Chalmers and those whom he represented as agent, but was forfeited

and permitted to lapse by the parties for whom said Chalmers was acting as agent, among whom was the said Hallenborg.

VIII.

That afterwards said Gage undertook to negotiate another contract or option for the sale of said stock.

That plaintiff Hallenborg and John H. Costello opened negotiations with said Gage and undertook to procure an option from him for the purchase of said stock so held by him as trustee, at $2.50 per share. That Grant R. Bennett, as attorney of the city of New York, came to Phœnix, Arizona, with a power of attorney from said Hallenborg and personally opened negotiations in behalf of said Hallenborg to procure an option for the purchase of the stock then held in pool by the said Gage.

That defendant Costello was personally present during this time, which occurred about the month of October, 1900.

That various contracts were drawn up and submitted for
311 consideration of the parties trying to effect a deal, and that the form of contract which was drawn agreeable to and in conformity with the views and agreements expressed by plaintiff through his said attorney, Grant R. Bennett, is attached to defendants' second amended answer, marked Exhibit 5, and made a part thereof.

That the same was consented to by plaintiff Hallenborg and his attorney, Grant R. Bennett, but that objections were raised thereto by said Costello, and that said Hallenborg being unable to or not desiring to enter into said contract alone and without said Costello, the same was not, for that reason, signed.

That various other contracts were suggested and drawn of like tenor and import, all of which were consented to by the said Hallenborg and said Cobre Grande Copper Company, but were not satisfactory to said Costello, and they in turn were rejected and not signed for that reason.

That these negotiations were kept up between plaintiff Hallenborg and Costello, on the one part, and the defendant Gage, as trustee as aforesaid, on the other part, until about the first week of December, 1900, and nothing resulted therefrom.

That thereupon said Gage opened negotiations with the said Greene to sell him the stock.

312 That said Greene offered to purchase the stock upon better terms than anybody else had ever offered.

That said Gage consulted the directors and a large majority of the stockholders of the Cobre Grande Copper Company and they urged him to enter into a contract with Greene for the sale of the stock. That said stock represented by Gage (participating in said contract) comprised the entire stock of the Cobre Grande Copper Company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties.

FILE COPY.

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
NOV 21 1905
JAMES H. McKENNEY,
Clerk.

No. 87.

AXEL W. HALLENBORG *et al.*,
Plaintiffs and Appellants,

vs.

COBRE GRANDE COPPER COMPANY *et al.*,
Defendants and Respondents.

BRIEF FOR APPELLANT.

ALFRED B. CRUIKSHANK,
of Counsel for Appellant.

L. MIDDLEDITCH CO., 93 DUANE ST., N. Y.

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vs. Cobre Grande Copper Company, *et al.* appellees. Assignment of errors. Filed May 16, 1904. S. M. Cullom, clerk. Atwater & Cruikshank, J. F. Wilson, Hawkins, Ross & Anderson, attorneys for appellants.

341 In the Supreme Court of the Territory of Arizona.

Be it remembered that heretofore and on to-wit the 13th day of January A. D., 1903, the same being one of the regular judicial days of the January term A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court, which said order is in words and figures, as follows, to-wit:

AXEL W. HALLENBORG, ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY, ET AL., Appellees,
} No. 822.

Comes now Jno. J. Hawkins, Esq., attorney for appellants herein, and moves the court that this cause be heard on oral argument.

Now comes W. H. Barnes, Esq., for appellees herein, and moves the court that this cause be passed.

Now comes Jno. J. Hawkins, Esq., for appellants herein and moves the court that this cause be submitted at the present time. It is ordered by the court that this motion be denied.

And afterwards and upon to-wit the 19th day of January, A. D., 1903, the same being one of the regular judicial days of the
342 January term A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:—

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees.
} No. 822.

Comes now J. F. Wilson, Esq., for appellants, and moves the court to grant appellants' motion to set this cause for hearing at some time during the present term of court, and extend the one hour limit for argument.

It is ordered that this motion be passed for the present, and if presented Friday morning, January 23, 1903, will be considered.

And afterwards and upon to-wit the 23rd day of January A. D., 1903, the same being one of the regular judicial days of the January term A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

343 AXEL W. HALLENBORG ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees. } No. 822.

It is ordered that the motion to set cause for hearing at sometime during the present term of court and extend the one hour limit for argument, filed herein by appellants, be continued until March 20th, 1903.

On motion of J. C. Herndon, Esq., attorney for appellees herein it is ordered that he have until May 1st, 1903, in which to file briefs.

And afterwards and upon to-wit the 20th day of March, A. D., 1903, the same being one of the regular judidical days of the January term A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures as follows, to-wit:

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
vs.
COBRE GRANDE COPPER COMPANY, Appellees. } No. 822.

On motion of J. F. Wilson, Esq., attorney for appellants herein, it is ordered that this cause be set for hearing May 23rd,
344 1903.

And afterwards and upon to-wit the 23rd day of May, A. D. 1903, the same being one of the regular judicial days of the January term, A. D., 1903, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
vs.
COBRE GRANDE COPPER COMPANY, ET AL., Appellees. } No. 822.

On motion of Jno. J. Hawkins, Esq., attorney for appellants herein, it is ordered that Henry G. Atwater, Esq., be entered of record of counsel for appellants.

This cause coming on for hearing was argued by Jno. J. Hawkins, Esq., for appellants and by Messrs. W. H. Barnes and Ben Goodrich for appellees, and argument continued until this afternoon.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

345 AXEL W. HALLENBORG, ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY, ET AL., Appellees. } No. 822.

Argument was resumed in this cause by Messrs. Ben Goodrich and M. A. Smith, for appellees, and Henry G. Atwater for appellants, and concluded by W. H. Barnes for appellees, and cause ordered submitted.

And afterwards and upon to-wit the 12th day of January A. D., 1904, the same being one of the regular judicial days of the January term A. D., 1904, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
vs.
COBRE GRANDE COPPER COMPANY, E. B. Gage, W. M. Adamson, John H. Costello, J. Henry Wood, and Con O'Keefe, its Directors; William C. Greene, George Mitchell, Phœnix National Bank of Phœnix Arizona Territory, Cananea Consolidated Copper Company, Greene Consolidated Copper Company, Appellees. } No. 822. (Judgment.)

346 This cause having been heretofore submitted and by the court taken under consideration, and the court having considered the same and being fully advised in the premises: It is ordered that the judgment of the district court be and the same is hereby affirmed.

It is further ordered, adjudged and decreed, that the appellees herein, do have and recover of and from Axel A. Hallenborg and J. Edward Addicks, appellants herein, and Fidelity and Deposit Company of Maryland, surety on appeal bond, their costs in this court, taxed at twenty-eight and 75/100 ($28.75) dollars, and their costs in the court below in this cause incurred.

And afterwards and upon to-wit the 26th day of March A. D. 1904, the same being one of the regular juridical days of the January term A. D., 1904, of said court, the following order, *inter alia*, was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

AXEL W. HALLENBORG ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees. } No. 822.

It is ordered that the motion for re-hearing, filed herein by appellants, be and the same is hereby submitted.

347 And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:

AXEL W. HALLENBORG ET AL., Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees. } No. 822.

It is ordered that the motion for re-hearing, filed herein by appellants, and heretofore submitted, be and the same is hereby denied.

And afterwards and upon to-wit the same day the following other order was had and entered of record in said court in said cause, which said order is in words and figures, as follows, to-wit:—

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
vs.
COBRE GRANDE COPPER COMPANY ET AL., Appellees. } No. 822.

In this cause, Jno. J. Hawkins, Esq., attorney for appellants, in open court gave notice of appeal from the judgment of this court, to the Supreme Court of the United States, and moved the
348 court that the appeal be allowed, and that it fix the amount of the cost bond on appeal, whereupon, it was ordered by the court that the appeal be allowed, and it was further ordered that the amount of the bond on appeal be fixed in the sum of one thousand ($1,000.) dollars.

349 Clerk's Certificate.

UNITED STATES OF AMERICA,
Territory of Arizona, } *ss:*

I, Shelby M. Cullom, clerk of the supreme court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to 348, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Axel W. Hallenborg, *et al.* appellants, against The Cobre Grande Copper Com-

pany, *et al.*, appellees, as the same remain of record and on file in said office.

Also that the citation attached hereunto, is the original citation issued by said supreme court of the Territory of Arizona.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said supreme court, at Phœnix, Arizona, this 15th day of June, 1904.

[Seal Supreme Court of Arizona.]

SHELBY M. CULLOM,
Clerk Supreme Court of Arizona.

350 In the Supreme Court of the Territory of Arizona.

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants,
versus
COBRE GRANDE COPPER COMPANY, a Corporation, *et al*, Appellees.
} A Citation

The United States of America to Cobre Grande Copper Company, a corporation, E. B. Gage, W. M. Adamson, John H. Costello, Henry Wood, and Con O'Keefe, directors; William C. Greene, George Mitchel, Phœnix National Bank of Phœnix, Arizona, Cananea Consolidated Copper Company, Sociedad Anonima, and Greene Consolidated Copper Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, sixty days from the date hereof, pursuant to an appeal allowed by the honorable chief justice and the judges of the supreme court of the Territory of Arizona, on the 16th day of May, A. D. 1904, from a judgment rendered by said court, on the thirteenth day of January, A. D. 1904, the same being so rendered on final hearing of appellants' above entitled appeal, and from the order made
351 and rendered by said court on the 26th day of March, A. D. 1904, denying the petition of said appellants for a rehearing of their said appeal, to show cause, if any there be, why the said judgment and order should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of May in the year of our Lord one thousand nine hundred and four.

EDWARD KENT,
Chief Justice of the Supreme Court
of the Territory of Arizona.

Services of the foregoing citation admitted this 16 day of May, A. D. 1904.

L. H. CHALMERS,
Attorney for Appellees.

[Endorsed:] No. 882. In the supreme court of the Territory of Arizona. Axel W. Hallenborg and J. Edward Addicks, appellants, *vs.* Cobre Grande Copper Company, a corporation, *et al*, appellees. A citation. Filed May 16, 1904. S. M. Cullom clerk. Atwater & Cruikshank, J. F. Wilson, Hawkins, Ross & Anderson, attorneys for appellants.

Endorsed on cover: File No. 19,453. Arizona Territory supreme court. Term No. 87. Axel W. Hallenborg and J. Edward Addicks, appellants, *vs.* Cobre Grande Copper Company *et al.* Filed August 23rd, 1904. File No. 19,453.

(c.) Because said action as shown by said contract on its face, resulted in leaving the trust imposed in his hands as such trustee and which he has accepted, without a trustee to carry out the purposes of the trust, which should not be permitted in equity.

Seventeenth. The court erred in failing to hold that the facts established at the trial entitled appellants to the appointment of a receiver for the Cobre Grande Copper Company, for the reason that it appears from said facts that the directors now in office of the Cobre Grande Copper Company, were hostile in interest to said company and had procured control thereof and their appointment as directors, for the sole purpose of preventing the company from prosecuting its claims to the mines in controversy and to enable appellee Greene and his interests to retain control and possession of said mines, thereby to defraud appellants and all others in like estate, of their rights and interests in and their remedies against said company.

Eighteenth. The court erred in failing to remand this cause with directions that a mandatory injunction issue in favor of ap-
337 pellants, directing the return to the custody of the Phœnix national bank of the deeds and escrow papers which had been originally placed with said bank under the Mitchell-Greene contract and which had afterwards been delivered by said bank to appellee Greene; or, in case said papers had been lost or destroyed, that duplicates thereof be executed and deposited with said bank pending the determination of its litigation, for the reason that the judgment of the Maricopa County court, directing the return of said deeds to Greene, was collusive and void, for the reasons hereinbefore set forth and for the additional reason that it was not authorized under the pleadings in the case in which it was rendered.

Nineteenth. The court further erred in overruling appellants' motion for a rehearing filed in this cause, for the reasons specifically stated therein and for the errors hereinbefore set forth.

Twentieth. The court erred in affirming the judgment appealed from, for the reason that the statement of facts in the nature of a special verdict, found and certified by said court for the purposes of this appeal, show that prior to December 12, 1900, the Cobre Grande Copper Company, through its officers, agents and attorneys, was engaged in various litigations with some of the appellees herein, wherein it was seeking to protect and enforce its claimed rights in the mining properties in controversy for the use and benefit
338 of its stockholders, among whom were the appellants herein; that on said December 12, 1900, the president of the Cobre Grande Copper Company entered into an agreement with the then adversaries of said company in its pending litigations, whereby said company purported to divest itself of all its rights in said litigations and mining properties and renounce the same to its adversaries; that in pursuance and performance of said agreement, said litigations were abandoned and dismissed; that under said agreement, the officers, directors, attorneys of the Cobre Grande Copper Company received various special benefits; that appellants although

both were large stockholders and appellant Hallenborg was a large creditor of said company, were ignored and no provision made for the recognition of their rights; that the Cobre Grande Copper Company is now dominated and controlled by appellee Greene and his associates, having been divested of all its properties and choses in action; that unless equity comes to the aid of appellants, their rights and interests in said company will be rendered valueless and they will suffer great and irreparable damage and injury.

In view of all of which, it was the plain duty of a court of equity either to appoint a receiver as prayed for, or to grant such other and different relief as appeared meet and proper in the premises.

Twenty-first. The court erred in denying and refusing to
339 make and certify the statement of facts in the nature of a special verdict requested by appellants and in holding that the affirmance by the supreme court of Arizona of the judgment of the trial court amounted to an affirmance of the findings of the trial court and precluded the supreme court of Arizona from making and certifying a statement of facts in any way different from the findings of the lower court, for the reasons:

(*a*.) That the form of statement requested by appellants included only material matters proven by uncontroverted testimony in the record, was fair, impartial and complete, and should have been adopted by the court;

(*b*.) That the findings of the lower court did not completely set out the material facts proven and contained a partial statement of the case, which omitted many proven facts material to appellants' case and which are set out in the statement presented by appellants and refused by the court;

(*c*.) Under 1 Supp. R. S. U. S., p. 7, being p. 80, 43d. Cong., 1st sess., Apr. 7, 1874, it was the imperative duty of the supreme court of Arizona to examine into the record of this case and make and certify a statement of facts in the nature of a special verdict, which should include all material facts proven by uncontroverted testimony;

(*d*.) That under said law of Congress, the supreme court of Arizona was required in this case to examine the record and prepare
340 a statement of facts in the nature of a special verdict from the record itself, regardless and independent of the findings made by the lower court.

All of which assignments and specifications of error are most respectively submitted and reversal prayed for thereon.

HAWKINS, ROSS & ANDERSON,
J. F. WILSON,
ATWATER & CRUIKSHANK,
Attorneys for Appellants.

(Endorsed:) No. 822. In the supreme court of the Territory of Arizona. Axel W. Hallenborg and J. Edward Addicks, appellants,

no good consideration for the notes, and that the same were paid.

Further answering, said defendants pleaded the proceedings and judgment in the Third District Court of Arizona, as aforesaid; also the pleadings and judgment in the El Paso Court; also that Hallenborg acquiesced in the agreement of December 12, 1900, through his agent, Grant R. Bennett; and that the said Greene acted upon that acquiescence; and, therefore, that Hallenborg is estopped from making his claim herein.

Said defendants further pleaded a counterclaim of one hundred thousand dollars ($100,000) damages against the plaintiff for wrongfully publishing his claims and these proceedings with purpose to injure Greene and the Greene Consolidated Copper Company. No evidence on this last matter was offered at the trial.

The defendant directors of the defendant Cobre Grande Copper Company and the Phoenix National Bank answered to the merits as follows:

They set up that in the suit brought in the Third District, Maricopa County, referred to in the complaint, by the Cobre Grande Copper Company against Greene *et al.*, to prevent the delivery to Greene of the deeds to said mining property, the judgment was for the defendant, and they pleaded the same as a bar.

They also pleaded as a bar judgment in an action between the Cobre Grande Copper Company and Greene *et al.*, commenced in El Paso, Texas, about January 31, 1900, to recover copper matte where judgment went for defendants.

They further pleaded that defendant Greene originally owned the property in question, or had options to purchase the same; that he formerly executed an option to the defendant Mitchell as purchaser, for $250,000; that Mitchell assigned the option to the Cobre Grande Copper Company, which entered into possession and began to operate the mines; that in October, 1899, controversies arising between the Cobre Grande Copper Company and Greene, the latter entered into possession of the property, whereupon litigations arose concerning it; that a

majority of the stockholders of the Cobre Grande Copper Company pooled their stock for their protection and defense in these litigations, and made numerous contracts from time to time for the sale of that stock, which they placed in the hands of E. B. Gage, as trustee, and none of which contracts were carried out, the price named being $2.50 a share; that plaintiff Hallenborg and others were parties to said contracts as proposed purchasers; that the Cobre Grande Copper Company was embarrassed for money; that finally, the stockholders in the pool becoming restless and the defendant Greene offering to purchase the stock upon better terms than anybody else had offered, the defendant Gage, after consulting the directors and a majority of the stockholders, and with their approval, entered into the contract of December 12, 1900, which was subsequently ratified by the Board of Directors and the stockholders; that all of the stockholders except Hallenborg had ratified the contract and accepted the price; that the same was entered into in good faith, etc.; that the suits pending in New York are still pending; that the defendants have no information as to the disposition of the Mexican suit; and that the other suits referred to in the complaint have been dismissed.

The defendant Mitchell appeared by his attorney, R. E. Morrison, denied the material allegations of the complaint, and pleaded acquiescence of the plaintiff in the agreement of December 12, 1900.

The defendant, the Cananea Consolidated Copper Company, appeared by its attorneys, Barnes and Martin, and especially demurred on the ground that it was a Mexican corporation, and transacted no business in Arizona, and has no agent here.

The defendant Costello answered repudiating all intent to defraud in the agreement of December 12, 1900, on his part.

The *plaintiff replied* to these answers at considerable length, demurring to the whole and to certain parts thereof as insufficient; denying that these actions pleaded

as a bar were such in fact, or that the records contained the findings alleged; further stating that the judgments so pleaded as a bar were obtained by collusion and while defendant Greene was in control of both sides of the litigation.

Further Proceedings on the Record.—Injunction was granted April 11, 1901, prohibiting dismissal of suits, &c., by defendants and duly served (*Record,* pp. 90, 111).

Application by Addicks to intervene as plaintiff December 14, 1901, granted January 25, 1902 (p. 44). Trial May 12 to 15, 1902, at Prescott, Arizona, before Judge Sloan, without a jury. Decision September 18, 1902, in favor of defendants (see *Record Minutes,* p. 46; *Opinion, Trial Judge Sloan,* p. 47; *Judge Sloan's Findings,* p. 145; *Judgment,* p. 154).

Exceptions to findings were duly taken and noted (p. 155) and a motion for a new trial made by plaintiffs September 20, 1902 (p. 155), stating grounds thereof.

The motion for a new trial was denied October 28, 1902, during the same term and plaintiffs excepted (*Record,* pp. 154, 155).

An appeal was thereupon taken in open court to the Supreme Court of Arizona from the judgment and order denying a new trial (*Record,* p. 47). An assignment of errors on this appeal was filed (*Record,* p. 162).

On January 12, 1904, the appeal having been heard by the Supreme Court of Arizona, the judgment was affirmed (*Record,* p. 214).

On March 26, 1904, a motion for a rehearing was made to the Supreme Court of Arizona and denied.

On May 16, 1904, a special verdict containing the facts found by the Trial Court and the Supreme Court of Arizona was rendered by the latter Court and duly filed (*Record,* pp. 193-200).

On the same day, May 16, 1904, the assignment of errors was filed for the consideration of this Court (*Record,* p. 205) and an appeal taken to this Court (p. 215) and a citation issued and duly served (p. 216).

No serious Controversy as to the facts.—It will be seen from this résumé of the pleadings that there is no serious conflict as to the facts in this case, the controversy being confined to the legal inferences to be drawn from admitted or proven facts and the legal rights of the parties dependent thereon. It is admitted that the Cobre Grande Copper Company was in possession of the valuable mines and mining plant in question constituting its entire assets in the fall of 1899 and that Messrs. Greene and Mitchell, while officers, seized that property and turned it over to the defendant corporations, the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company and that actions were immediately brought to recover it; and that the abandonment of the claims of the Cobre Grande Copper Company and of those actions was secured by Greene and his corporations obtaining control of the management of the Cobre Grande Copper Company. All this appears from the pleadings. And the alleged defenses on the merits as pleaded are these: *first,* that Greene had a right to purchase the control of the Cobre Grande Copper Company and thus to cause these actions to be dismissed, and *secondly,* that the judgment of dismissal rendered in the main action of the Cobre Grande Copper Company against Greene and others in Maricopa County, Arizona, rendered four months after Greene had obtained control of the company, was really a decision upon the merits.

The plaintiffs claim that neither of these defenses are valid in equity and that on the undisputed facts the plaintiffs were entitled to relief.

Next comes the question of the character of the relief to which the plaintiffs were entitled, which was virtually all that was decided against the plaintiffs here, the Court below holding that the only practical relief was the appointment of a receiver, which in its discretion, it had the right to refuse, and did refuse, turning plaintiffs out of court.

It will be seen, therefore, that this appeal brings up really only a question of law, namely, the character of the relief, if any, to be given plaintiffs on the undisputed facts.

Findings of Fact in the Court Below.—The findings of Judge Sloan are printed on pages 145-153 of the Record, and they were adopted by the Supreme Court of Arizona in the form of a special verdict (see *Record*, pp. 193-200).

In substance the Court finds: (I) The incorporations and character of the parties as alleged; (II) the residences and ownership by plaintiffs of the stock and obligations of the company as alleged; (III & IV) the ownership of the mines in question by Greene in November, 1898; the transfer of the possession to the Cobre Grande Copper Company under certain contracts in return for 199,995 shares of its capital stock; the controversy between the Cobre Grande Copper Company and Greene over the right to possession; the forcible taking possession by Greene in October, 1899; suits in Sonora, El Paso, Texas, and in the State of New York by the Cobre Grande Copper Company to recover its property; a suit in Maricopa County, Arizona, No. 3437, by the Cobre Grande Copper Company against Greene, Mitchell, and the Phoenix National Bank to restrain the return to Greene by the bank of the title deeds to the property and for an accounting of the product of the mines and the value of its plant; the trial of that action and the dismissal of the complaint on April 15, 1901. (*This was after Greene's control.*) (V, VII, VIII.) (*There is no number VI*). That while this litigation was in progress there were various pooling arrangements by which a majority of the stock of the Cobre Grande Copper Company was put in the hands of the defendant Gage to sell at $2.50 a share; negotiations for the sale of the same to the plaintiff and otherwise, none of which had been consummated up to December 12, 1900; (VIII) that Gage, with the consent of the directors and majority of the stockholders undertook negotiations with Greene and made the agreement of December 12, 1900, for the sale to him of the majority of the capital stock of the Cobre Grande Copper Company for $2.50 a share, being the contract described in the complaint. The language of the Court is that "*there-upon said Gage took the matter up with said Greene and did on the 12th day of December, 1900, enter into*

"the contract of that date mentioned in the plaintiffs' original complaint filed in this action." The Court finds that the agreement was made in good faith by Gage and upon the advice of counsel that it could not successfully maintain its suit against Greene; and that Hallenborg protested against the transaction and refused to accept the price of his stock or to take part in the contract; (IX) that all the suits brought by the Cobre Grande Copper Company except those in New York have been dismissed before this action; that various sums outside of the purchase price of the stock amounting in all to $185,000 paid by Greene under this agreement of December 12th, 1900, were intended for the creditors of the Cobre Grande Copper Company and for distribution among its officers, attorneys and counsel as therein stated; (X) that the only property now left in possession of the Cobre Grande Copper Company is the money paid over under that agreement; (XI) that in consequence of the decision in the Maricopa County suit No. 3437, the injunctions granted in this action restraining the return of the title deeds to Greene have been dissolved, and therefore plaintiffs' remedy in that regard was gone and that *"there is "nothing before the Court except an application for the "appointment of a receiver"* (*Record*, p. 153).

From this statement of facts, as found by the Court below, it is clear that the plaintiffs' case on the facts is substantiated. True, the Court does not find whether or not the judgment of April 15, 1901, dismissing the action brought by the Cobre Grande Copper Company against Greene in Maricopa County, Arizona, to recover its property was or was not collusive; but it finds the fact that it was not rendered until over four months after Greene was *dominus litis* of both sides of the controversy; and it finds the agreement of December 12th, 1900, which provided for the dismissal of that action and the legal result is that the judgment must be described in equity as a collusive judgment and in no way binding upon the plaintiffs as stockholders of the Cobre Grande Copper Company.

Assignment of Errors for the Consideration of this Court.—The assignment of errors is found on pages 205-211 of the Record. They are twenty-one in number and present, in various forms, every point raised upon this appeal. To expedite the labor of the Court however, they may be reduced and classified as follows:

First, Second and Tenth: That the Court erred in receiving in evidence the judgments of the Maricopa County, Arizona, Court, and of the El Paso, Texas, Court, and in giving them any effect as against the plaintiffs in this action, said judgments being collusive and the plaintiffs not having been parties thereto.

Eighth, Sixteenth and Twentieth: That the Court below erred in failing to find the agreement of December 12th, 1900, fraudulent and illegal and void as to the plaintiffs.

Ninth, Twefth, Fourteenth, Fifteenth, Seventeenth: That the Court erred in failing to hold that a Receiver should have been appointed.

Seventh, Eleventh, Thirteenth and Eighteenth: That the Court erred in not giving the relief demanded in addition to the appointment of a Receiver.

Fifth: "The Court erred in failing to reverse the "judgment appealed from for the error of the Trial "Court in permitting E. B. Gage, over the objection of "appellants, to answer the following question while on "the stand testifying on behalf of himself and other ap-"pellees, to wit: Q. Referring to the agreement of De-"cember 12, 1900, will you state what the amount of "twenty-five thousand ($25,000) dollars and the two "amounts of thirty thousand ($30,000) dollars therein "mentioned, making eighty-five thousand ($85,000) dol-"lars was for? for the reason that said contract is un-"ambiguous and speaks for itself, and that the question "called for a conclusion of the witness."

Twenty-first: That the Court erred in refusing to make a full statement of the facts, the findings of the lower Court being incomplete and partial.

Third, Fourth and Sixth: Were objections to the admission of certain papers in connection with the pooling agreements, which do not appear to be vital on this appeal.

Nineteenth: A question of practice not important at this stage.

The above assignment of errors and the reasons therefor are stated in detail and at length upon the record.

The Facts chronologically stated.—In November, 1898, the defendant William C. Greene was the owner of a number of valuable copper mines in the District of Cananea, State of Sonora, Republic of Mexico, and on November 26th, 1898, he made a contract intending to sell them to the defendant George Mitchell, for $250,000, of which the sum of $12,500 was to be paid down in cash by Mitchell and the balance was to be paid in instalments, of which the first instalment of $37,500 was to be paid on November 26th, 1899, and the other payments subsequent thereto (*Finding*, p. 147).

This contract granted to Mitchell the right and permission to enter upon and take possession of the properties and every part thereof, and to work and operate the same and to extract, ship and treat the ores thereof and Mitchell on his part agreed to erect on the premises a smelting furnace with such appliances as he might deem best for operating the same. Greene agreed to warrant and defend the title. The contract also provided that in case Mitchell failed to make any of the payments provided for, that then the contract should be null and void and the property and plant thereon should revert to Greene (*Record*, p. 102).

In order to insure the carrying out of this contract on the part of Greene, deeds dated November 26, 1898, conveying the title of the property to Mitchell were duly

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IN THE

Supreme Court of the United States.

AXEL W. HALLENBORG and J. EDWARD ADDICKS, Appellants, AGAINST COBRE GRANDE COPPER COMPANY, *also* E. B. GAGE, W. M. ADAMSON, JOHN H. COSTELLO, J. HENRY WOOD and CON O'KEEFE, its Directors, *also* WILLIAM C. GREENE and GEORGE MITCHELL, PHŒNIX NATIONAL BANK, of Phœnix, Arizona, CANANEA CONSOLIDATED COPPER COMPANY and GREENE CONSOLIDATED COPPER COMPANY, Respondents.	October Term, 1905, No. 87.

BRIEF FOR PLAINTIFFS AND APPELLANTS.

Statement of the Case before this Court.—This is an appeal by the plaintiffs from a judgment of the Supreme Court of the Territory of Arizona, rendered January 12, 1904, affirming a judgment in equity of the District Court

of the Fourth Judicial District of Arizona dated September 18, 1902, rendered by Mr. Justice Sloan, Trial Justice at Prescott, after a trial before him without a jury; which judgment dismissed the complaint, dissolved an injunction previously obtained *pendente lite*, and denied plaintiffs' application for a Receiver, with costs of the action.

The Trial Court made numerous findings of fact which were afterward adopted by the Appellate Court (*Record*, pages *193-200*).

This is a minority stockholder's and creditor's action brought originally by Axel W. Hallenborg as holder of 8,617 shares of the Cobre Grande Copper Company, an Arizona corporation, and also as creditor of said corporation for advances to the amount of $39,080.25, as declared in the bill of complaint, but to the amount of $50,005, as proved on the trial. The plaintiff Addicks, owning 5,000 shares, was allowed to intervene on the trial, and adopted the complaint of Hallenborg as his own.

The ground of complaint, as alleged, was, in substance and briefly, that the Cobre Grande Copper Company was, in 1898 and 1899, in possession of valuable mines in Cananea, in the State of Sonora, Mexico, and that Greene and Mitchell, then officers of the Company, did, in October, 1899, oust the Company from its lawful possession of the mines, turn them over to the defendants, the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company, both controlled by Greene. That these acts being challenged by the Cobre Grande Copper Company, suits were begun in its behalf in 1899 and 1900, in the Third District of Arizona (Maricopa County) and elsewhere, with the object of recovering its property from Greene, Mitchell and these corporations; and that pending these suits and on December 12, 1900, Greene, individually and on behalf of said corporations, bought up a majority of the stock of the Cobre Grande Copper Company, subsidized its officers, attorneys and counsel, procured a collusive decision of the main Maricopa County case in his favor and a dismissal of the other cases, thus virtually destroying the value of the plaintiffs' Cobre Grande stock, and render-

ing valueless Hallenborg's claim against the Company for his advances.

The plaintiffs asked that a Receiver of the Cobre Grande Copper Company be appointed, and for an injunction, accounting and other appropriate relief, including the right to intervene and be heard in the pending suits brought by the Company against Greene and others as aforesaid.

Plaintiffs' main allegations of fact were not seriously controverted in the pleadings or on the trial, and are mostly supported by the findings of the Court below. The legal inferences therefrom were, of course, strenuously denied by defendants and will be the subject of discussion on this appeal.

The complaint was dismissed apparently on the ground that the Cobre Grande Copper Company having no property left, and the collusive judgment rendered against it in Maricopa County being a bar to the recovery thereof, a Receiver would be useless and unnecessary; that plaintiffs' remedy was by a direct action by plaintiffs themselves and not through a Receiver (*See Trial Judge Sloan's opinion, p. 56*).

On appeal duly taken by plaintiffs to the Supreme Court of Arizona the judgment of dismissal was affirmed, a motion for a rehearing was denied and special findings were made adopting those of Trial Justice Sloan.

Substance of the Pleadings.—The *complaint,* as amended, alleged the incorporation of the various defendant corporations, that the defendant Gage was director and president of the defendant Cobre Grande Copper Company; and that the defendants Adamson, Costello, O'Keefe, and Wood, were also directors; that the Cobre Grande Copper Company is an Arizona corporation with a capital stock of five hundred thousand dollars ($500,000) divided into 200,000 shares at $2.50 each;

That defendant Greene is president of the Greene Consolidated Copper Company, a West Virginia Corporation; and

That plaintiff Hallenborg is a creditor of the defendant Cobre Grande Copper Company to the amount of $40,000 and upwards; and a stockholder, holding 8,000 shares and upwards.

That prior to January 1, 1900, the Cobre Grande Copper Company had been engaged in a series of litigations with the defendants, Greene, Mitchell, and their associates, which litigations, and the claims and allegations of the Cobre Grande Copper Company relating thereto, are set forth at length in the complaint, in substance as follows:

That in the fall of 1899, the Cobre Grande Copper Company was in possession of certain valuable mining properties in the Cananea Mountains, in Sonora, Republic of Mexico; that Greene and Mitchell were at that time directors of the Cobre Grande Copper Company and unlawfully obtained possession of said mines about October 11, 1899, and turned them over to the Cananea Consolidated Copper Company, and through it, to the Greene Consolidated Company; and thereupon that various actions and proceedings were taken on the part of the Cobre Grande Copper Company, to gain possession of said property; namely: an action in the Third District of the Territory, to prevent Greene from getting possession of the title deeds; a proceeding in Mexico to recover the property itself; and suits in New York and El Paso to recover some of the copper matte, etc., all of which suits and actions were meritorious, and brought in good faith for the benefit of the Cobre Grande Copper Company.

The complaint further shows that just prior to December 12, 1900, defendant Greene and the Greene Consolidated Copper Company for the purpose of getting rid of this litigation devised a scheme to get control of the Cobre Grande Copper Company, and thereupon entered into a corrupt agreement with the defendant Gage, who was then president of the Cobre Grande Copper Company, for that purpose. The details of this agreement which was in writing are set out in the complaint, and they amount to this: That Gage, holding at that time

a large amount of the stock as trustee of certain stockholders, agreed to turn over the stock itself and the control of the Corporation to Greene, and the Greene Consolidated Copper Company, and to discontinue all of the suits and actions aforesaid, to deliver unto Greene the copper matte in controversy, and to himself resign and procure the resignations of his co-directors. No consideration whatever accrued to the Cobre Grande Copper Company under this agreement, but large personal benefits and advantages were to be received by Gage and Costello, both of whom were directors of the Company.

This mining property constituted substantially the entire property of the Cobre Grande Copper Company.

There were various other allegations and complaints incidental to these main charges, and intended to illustrate and connect them.

The *prayer* of the complaint is that the Cobre Grande Copper Company and its officers be enjoined from discontinuing these suits; and that a mandatory injunction be issued requiring them to prosecute the same; that plaintiff be allowed to intervene therein to protect his rights; that the defendant directors and officers be removed; and that a receiver be appointed to protect the property of the Cobre Grande Copper Company, and prosecute the claims aforesaid, etc.

The *relief* demanded against Greene and Mitchell was that they be restrained from demanding certain documents, evidence of the title to the disputed properties; and that they be required to account for the product of the mines and other property appropriated by them, with other relief unnecessary to detail here.

Substance of the Answers.—The defendants, Greene and the Greene Consolidated Copper Company, and the Cananea Consolidated Copper Company, appeared by Barnes and Martin and demurred on the ground that the complaint was multifarious, and that the plaintiff has a remedy at law and that the Court has no jurisdiction.

Further answering, the said defendants deny that the plaintiff is a stockholder and creditor, and say there was

Greene was to get 115,000 shares of the Cobre Grande stock held by Gage as trustee, being the stock in the pool or combination aforesaid, for $2.50 a share, payable in installments in about ninety days;

The copper matte in litigation in New York, or the proceeds thereof, were to be turned over by the Cobre Grande Copper Company to Greene and his company;

All the suits pending between Greene and the Cobre Grande Copper Company were to be dismissed or discontinued;

The directors of the Cobre Grande Copper Company were to resign;

Mr. Gage, in addition to the price of his own stock included in the pool, was to receive three sums of money, namely, $25,000, $30,000 and $30,000, in all $85,000; and 10,000 shares of stock of the Greene Consolidated Copper Company, whereof 5,000 shares (worth $50,000) were to be for his own use and benefit, and 5,000 more were for the use and benefit of Chalmers and others, attorneys for the Cobre Grande Copper Company in the Territory of Arizona;

Mr. Costello, who also was director of the Cobre Grande Copper Company, was to be satisfied by the surrender of a promissory note of $23,000, previously given by him to the Company;

Any of the stockholders in the pool might withdraw from this agreement so long as 51,000 shares were transferred to Mr. Greene, that evidently being supposed to be sufficient, in addition to what he already had, to vest the practical working control in his hands.

This agreement was swiftly carried into effect and pursuant thereto and at a meeting of the Board of Directors the following took place, as appears by the minutes in evidence:

> "Upon motion of Mr. Adamson, seconded by "Mr. O'Keefe, the following resolution was "adopted, namely:
>
> "RESOLVED, That William C. Greene be ap- "pointed agent of the Cobre Grande Copper Com-

"pany for it and in its name, to transact any and "all business of and on behalf of this Company, "and particularly to control and direct every and "all suits pending in the State of New York in "which this Company is a party; to discharge and "employ attorneys; to receive and receipt for "every and all assets of the Company; and to dis- "charge, adjust and satisfy every and all claim or "claims against it; to begin and prosecute or dis- "miss any suit or proceeding he may deem neces- "sary for the benefit of said Company" (*Record*, p. 90).

Effect of the Fraudulent Agreement.—Now, the result of this agreement was to destroy the rights of the plaintiffs Hallenborg and Addicks as follows:

First.—Plaintiffs had a right as stockholders in the Cobre Grande Copper Company to require that it should continue in the business of mining, as far as possible. They not only ha dan interest in its property, but in its franchise contained in its charter, obtained from the Legislature;

Second.—Plaintiffs had a right to the honest and faithful services of the directors of the Cobre Grande Copper Company, as their trustees; or that they should resign their offices; and they were deprived of that right because, instead of resigning, they turned the control of the company over to hostile hands;

Third.—Plaintiffs were entitled to the fair and unbiased judgment of the trustees in any dealings with other parties, and especially in a matter of this moment affecting the very life of the organizaton; and of that right they were deprived by the conduct of the trustees in accepting pecuniary benefits from Greene as a part of the consideration of a contract affecting the corporation;

Fourth.—They were entitled to have the offices of the corporation filled by officials acting in its interest; and

of that right they were deprived, and the offices were occupied by persons hostile to its interests;

FIFTH.—They were entitled to share in the property of the corporation; and that was disposed of without consideration; or for an utterly inadequate and secret consideration, not appearing at all in the open and written agreement submitted to them as the real agreement;

SIXTH.—They were entitled to have the officers chosen by fair appointment or election; and here the offices were bartered away for fraudulent consideration;

SEVENTH.—They were entitled to full knowledge of every act of the directors and they were deceived by a concealment of secret provisions with reference to $60,000 paid by Greene.

In every one of these respects, plaintiffs as stockholders and *cestuis que trust* of the Cobre Grande Copper Company were defrauded of their legal and moral rights.

No doubt Mr. Gage and each of the stockholders of the Cobre Grande Copper Company had a right to sell his stock to Mr. Greene or anyone else for any price he or they might see fit; but they had no right to enter into conspiracy and form a combination for the purpose of selling that stock in such a way as to vest control in parties hostile to the corporation.

No doubt the directors of the Cobre Grande Company had a right to resign their offices; but they had no right to enter into a combination with a view to resigning as a part of a bargain to transfer control to persons notoriously hostile, and engaged in actlve litigation with the company.

When these officials determined to sell out their stock in the company to a hostile interest, and especially when they determined to sell that stock by means of a combination for that purpose, they should have first resigned their offices as trustees. The moment they *conceived* that scheme of transfer to Greene that moment they became incompetent to serve as trustees for the other stock-

holders; they became, as it were, traitors to the corporation. Its interests and their own were distinct and hostile from that moment, and it was their duty at once and at the very inception of negotiations of that character, to resign their respective offices and allow the corporation to choose servants and agents who would act in its behalf with zeal and fidelity.

The fraud, therefore, in this case, originated at the moment that the directors as such began to traffic with Mr. Greene as managers or agents of a combination to put him in power. They were no longer competent to act as agents for Hallenborg.

The moment when an attorney or any fiduciary agent begins to traffic with the adversary of his principal with a view to the furtherance of his own interests as distinct from those of his principal, that moment he ceases to be competent to act in good faith for his principal.

These directors seem to have lost sight of the fact that this corporation was their principal, and had an existence entirely apart and separate, not only from that of each of them but from that of all of them, or of any combination which they could possibly form.

Authorities showing that the agreement of December 12, 1900, showed on its face a breach of trust.—In this very controversy the only Court which has yet passed on the merits has condemned this agreement in strong terms. In *Hallenborg* v. *Greene*, 66 Appellate Division Reports, N. Y. Supreme Court, 590, 595, the Court on appeal in affirming an order sustaining an injunction granted against defendants on similar facts characterized this contract as fraudulent and held that plaintiff was entitled to such relief as the New York Courts could grant, including a receiver within that State and an injunction.

The case of *Saranac and Lake Placid Railroad Company* v. *Arnold*, 167 N. Y., 368, the Court of last resort in the State of New York says (p. 374):

> "While the defendants owned substantially all "the stock, they did not own the corporation itself.

> "It was not their chattel, but was a distinct legal "entity with the right to own property, and they "could not appropriate its property to its own use "any more than any other agent or trustee can "appropriate the property of his principal. "Through their voting power they could manage "and control its affairs, but only as trustees, and "they were bound to observe the rule of *meum et* "*tuum*, and be as true to the corporation as if they "had sustained the same relation to an indi- "vidual."

And when Gage and Costello agreed to take money from Greene in this transaction, they were no longer competent to act as agents for Hallenborg or Addicks or any other stockholder of the corporation who chose to repudiate their act. Costello took the surrender of a note held by the Company against him without any reason whatever, so far as appears, and he was a director of the Company, and is a defendant here. Gage took $50,000 for himself besides $85,000 which he claims to be part of a secret trust yet unexplained and unaccounted for. Laying aside the question of the $85,000 (and that transaction, too, being a secret one, was fraudulent), yet the acceptance of the $50,000 or of any sum whatever for his personal use, or the mere consideration of such an offer, rendered him incompetent to act as trustee for the stockholders.

Nor could the directors vote Gage any sum whatever for back salary.

> *Bennett* v. *St. Louis & C. Co.*, 19 Mo., app. 349.

Human nature is such that it is a necessary presumption that the serious consideration by any official of an offer of $50,000 to be paid him as a part of a contract between his principal and a third party, renders him incompetent to act intelligently and zealously in the interest of his principal. Neither law nor equity ever

tolerates for a moment such trifling with a man's duties as is implied in such a bargain.

This case cannot be distinguished from *Menier* v. *Telegraph Works* (9 Ch. App., 350). In that case a bill was filed by a stockholder on behalf of himself and all other shareholders against the European Company, in which he was a shareholder, Hooper's Telegraph Works and two of the directors of his own company, for the purpose of preventing the carrying out of a resolution for the winding up of the European Company and for the abandonment of a pending suit involving the ownership of a valuable concession claimed to have been granted to one Baron de Mana in trust for the European Company. It was charged that these resolutions were adopted through the influence of Hooper's Company and by the vote of directors elected by the shares owned by Hooper's Company in the European Company, said company owning an absolute majority. It was also charged that the abandonment of the pending suit and the resolution to wind up were prejudicial to the interests of the European Company and to the advantage of Hooper's Company and to enable Hooper's Company to accomplish purposes of its own. It was *held* that the bill stated a good cause of action. The Court said

> "The case made by the bill is, very shortly, this: "The defendants who have a majority of shares "in the company have made an arrangement by "which they have dealt with matters affecting the "whole company, the interest in which belongs to "the minority as well as to the majority. They "have dealt with them in consideration of their "obtaining for themselves certain advantages. "Hooper's Company have obtained certain advan- "tages by dealing with something which was the "property of the whole company. The majority "has divided the assets of the company more or "less between themselves to the exclusion of the "minority. I think it would be a shocking thing "if that could be done, because, if so, the majority

to get control of this stock for the purpose of pressing the company's claims (*Findings V and VII*, pp. 148, 149).

William C. Greene and the Greene Consolidated Copper Company then undertook to stop the litigation against them by getting control of the Cobre Grande Copper Company, and their efforts resulted in a contract, dated December 12th, 1900 (*In Evidence*, p. 105; see *Finding*, p. 150). This contract, which was made between William C. Greene and the Greene Consolidated Copper Company on one hand and E. B. Gage, president of the company, and trustee for the stockholders, and the Cobre Grande Copper Company on the other, was to the following effect: Gage agreed to sell this stock at the rate of $2.50 a share and to deliver at least 51,000 shares, that, presumably being the amount which Greene and his associates still needed to obtain control of the Cobre Grande Copper Company. It was also agreed that Gage should have for his personal benefit 5,000 shares of stock of the Greene Consolidated Copper Company, worth $50,000; that the attorneys for the Cobre Grande Copper Company should also have 5,000 shares of stock and that there should also be paid to Gage sums of $25,000 and $30,000 and delivered to him 3,000 shares of the stock of the Greene Consolidated Copper Company, worth $30,000.

In all $185,000 in stock and cash was thus to be distributed.

Upon these payments being made it was agreed that the directors of the Cobre Grande Copper Company should resign, so that Greene might take possession of the company by his representatives.

It was further provided that John H. Costello, one of the directors, should have delivered up to him his note for $23,000, which was held by the Cobre Grande Copper Company.

It was further agreed that the various suits pending between the Cobre Grande Copper Company and Greene and his associates should be dismissed.

This contract is described in the complaint (pp. 7, 8 & 9), is in evidence (p. 105, *Plff's Ex., 3*), and is referred to in the Findings as follows:

"Thereupon said Gage took the matter up with "said Greene and did on the 12th day of December, "1900, enter into the contract of that date men- "tioned in the plaintiff's original complaint filed "in this action" (*Finding VIII*, p. 150).

The making of this contract having become known to Hallenborg, he brought this action and obtained April 11, 1901, from Judge Sloan a preliminary injunction prohibiting the carrying out of the agreement (*see Injunction*, p. 111), and it was served April 13, 1901 (*see Return*, p. 90).

At the time this injunction of Judge Sloan was served the final payments for the stock had been made by Greene, the stock had been transferred to him, the old directors of the Cobre Grande Copper Company had resigned and their places had been filled by Greene and his associates, and Greene had become president of the Cobre Grande Copper Company, all as provided for by the agreement of Deccember 12, 1900, so that he then controlled both sides of the litigation, but found it impossible to dismiss the suit in Maricopa County on account of Judge Sloan's injunction. Thereupon a judgment collusive, as we claim was entered up April 15, 1901, in the suit dismissing the complaint in the Maricopa County suit and directing the delivery to Greene of the escrow papers held by the Phœnix Bank (*see Judgment*, p. 118; *Finding*, p. 147).

On the return of Judge Sloan's temporary injunction Greene's counsel, exhibited this collusive adjudication by Judge Street respecting the delivery of the deeds by the Phœnix Bank, and Judge Sloan therefore dissolved the injunction so far as it restrained the delivery of the deeds by the Phœnix Bank (*Finding* XI, p. 152).

After several adjournments this case came on for hearing and was tried before Judge Sloan in May, 1902. In the meantime Mr. Addicks had become a party plaintiff by intervention, as the holder of 5,000 shares of stock of the Cobre Grande Copper Company.

In September, 1902, Judge Sloan rendered his decision in which he held in substance that there was nothing up-

on which an injunction could act at that time, and that therefore the suit was simply one for the appointment of a receiver of the Cobre Grande Copper Company; that there was doubt as to whether the Court had power to appoint a receiver of the corporation under the circumstances disclosed by the proofs, and that he would refuse to appoint a receiver, more especially since every relief which the plaintiffs were entitled to under the facts alleged by them could be obtained by them in an action brought by them directly (*see Finding,* p. 153).

On appeal the Supreme Court of Arizona took the same view.

From the affirmance of that judgment this appeal is taken.

FIRST POINT.

THE AGREEMENT OF DECEMBER 12, 1900, AND ALL ACTS OF DEFENDANTS IN PURSUANCE THEREOF WERE IN VIOLATION OF PLAINTIFFS' RIGHTS AND ENTITLE THEM TO RELIEF IN EQUITY.

The situation on December 12, 1900, was this: Hallenborg was a stockholder in the amount of 8,000 shares, and a creditor for a large amount. Addicks was a shareholder in the amount of 5,000 shares. The corporation was engaged in a struggle for its existence. It was a party to numerous litigations in Arizona and elsewhere, resulting from its endeavor to regain possession of mining property of enormous value, variously estimated at from one to fifty millions of dollars, situated in Sonora, Mexico. The claim thereto constituted all its assets. Mr. Greene, the adversary in these litigations, was in possession of that property under a hostile claim, either individually or as president of the Greene Consolidated Copper Company, a rival mining corporation. During the year 1900, there had been formed a pool or combination of the stockholders to raise money to carry on these litigations on behalf of the Cobre Grande Copper Com-

pany against Greene. Hallenborg had been a party to that combination with the intention of ultimately purchasing, if possible a majority of the Cobre Grande stock; and he had advanced $40,000 to aid in these litigations and incidentally of course for the benefit of himself and the other stockholders. No doubt it was supposed that if this stock could be kept together in this combination and the litigation prosecuted, there would be a prospect, as soon as success dawned upon their efforts, of selling this pooled stock to either Hallenborg or his associates who were interested with him in advancing this money. It was no doubt further supposed that the money to prosecute the litigation could be much more readily borrowed on the strength of the combination of stockholders than in any way then feasible under the circumstances.

This effort and arrangement was not only lawful but commendable in the interests of the Cobre Grande Copper Company. The stockholders had a right to combine to raise the money to prosecute the litigations to recover their property and the Company had a right to borrow money for that purpose from its stockholders, and it was its duty to do so, if possible, in view of the large interests involved, compared with the amount disbursed in the litigation. No doubt it was the intention of Hallenborg and others to get a controlling interest in the corporation, and this was also laudable, since it was their intention, having obtained this power, to further the interests of the corporation by recovering its property, not only for the benefit of themselves but for the benefit of the other stockholders. If some one had not come to the aid of the corporation and loaned it money to press its claim for restitution of its property, the stock of the Company would have been valueless.

The Pooling Agreements.—The various pooling agreements between Gage, Orne, Knox and others are dated January 5, 1900; March 30, 1900; June 2, 1900 and November, 1900. The first three are substantially the same and provide for the holding of the stock by a trustee, the same to be sold at $2.50 a share to Chalmers, attorney

for the Cobre Grande Copper Company, who is described therein as agent. In the agreement of March 30, 1900, and also that of June 2, 1900, it is provided that Chalmers should advance to Gage such amounts as he might require to use to pay the obligations of the Company, the expenses of operating its property, and legal expenses. In case Chalmers succeeded in getting the money to buy the stock represented in the pool, the resignations of the present officers were to be handed in in order, of course, that a new election might be had and officers having the confidence of the purchasers of the stock, elected. If Chalmers were unable to complete the purchase by a certain date, the agreement should fail.

On November, 1900, a new agreement was proposed of similar character, which recites the litigations pending between Cobre Grande Copper Company and Greene, describes the property, and gives an option to Costello and Hallenborg of obtaining the stock. This agreement also provides for paying the debts of the corporation, amounting to many thousands of dollars therein set out, and for the expenses of the litigation, and the running expenses of the Cobre Grande Copper Company. As a part of these negotiations and schemes for raising money, power was given to Gage to sell the stock placed in his hands, or any part thereof "on such terms and conditions as he may deem advantageous to our interests." This agreement was dated October 24, 1900, and was signed by numerous stockholders, including Grant R. Bennett, who undertook to sign for Mr. Hallenborg, holding a written power of attorney from him (*Record*, p. 136).

Legal Effect of the Pooling Contract.—The parties to these pooling contracts including plaintiff had a right to rely on the trustee Gage, that the pool or combination would be used to benefit, not to defeat or destroy the interests and prospects of the corporation. For the stockholders who became a party to this combination, controlling a majority of its stock, became to some extent and for some purposes the corporation itself, and as-

sumed the trust relation of the corporation to its other stockholders. They were bound to act for its best interests; and such a combination or its managers could not any more than its formally elected trustees do any act whereby a profit should be made out of the corporation at the expense of the minority stockholders; and any such act would be a constructive fraud upon such minority stockholders.

> *Erwin* v. *Oregon Railroad and Navigation Company,* 27 Fed. Rep., 630.

That a majority combination of stockholders becomes a trustee for the minority is well settled.

> *Meeker* v. *Winthrop Iron Co.,* 17 Fed. R., 48.
> *Jackson* v. *Ludeling,* 21 Wallace, 616.
> *Farmers' L. & T. Co.* v. *N. Y. & Northern R. R. Co.,* 150 N. Y., 410.
> *Barr* v. *N. Y., L. E. & W. R. R.,* 96 N. Y., 444.
> *Gamble* v. *Q. C. W. Co.,* 123 N. Y., 91.
> *Menier* v. *Hooper's Tel. Works,* L. R., 9 Ch. App., 350.

The Fraudulent Agreement of December 12, 1900.—Such was the situation upon December 12, 1900, except that, at about that time, Greene and his attorney, Logan, of New York, with hostile intent, were actively engaged in Phœnix and Prescott in endeavoring to get control of sufficient amount of the stock of the Cobre Grande Copper Company to secure a majority so as to defeat the claims of the company against themselves.

Then it was that Gage entered into negotiations with Greene, which finally resulted in the agreement of December 12, 1900 (*Record,* pp. 105-108).

This agreement, which was executed by the Greene Consolidated Copper Company, represented by Greene, its president, on the one part, and by the Cobre Grande Copper Company, represented by Gage, its president, upon the other part, and by Greene and Gage personally, provided as follows:

executed by Greene and deposited, together with a written agreement relating thereto with the Phœnix National Bank of Phœnix, Arizona, to be delivered to Mitchell upon payment by him of the full purchase price, or in case he should default in the contract and his rights thereunder become forfeited, then the deeds were to be returned to Greene (*Record*, p. 103). After the making of the contract, Mitchell took possession of the mines and commenced to develop and improve them, and in May, 1899, in connection with the defendant Greene, organized the Cobre Grande Copper Company, and Mitchell, with the consent of Greene, transferred to it all his rights under the contracts to the mines and property connected therewith in return for 199,995 shares of its capital stock (*Finding* IV., p. 147).

On July 22nd, 1899, Greene made a supplemental contract with the Cobre Grande Copper Company acknowledging and ratifying the transfer to it of the rights of Mitchell under the contract and agreed to execute further assurances (*Record*, p. 103).

While the Cobre Grande Copper Company was proceeding with the working of the mines and before any payment had become due and on October 11, 1899, Greene took possession of the mines and turned out the Cobre Grande Company (see *Finding* IV., p. 148).

After Greene had taken possession of the property he organized a corporation known as the Cananea Consolidated Copper Company under the laws of Mexico, composed of himself and one Norton Chase, his attorney, as sole incorporators, and made a deed to this company of the whole property. This Cananea Consolidated Copper Company was formed for the purpose of holding title to the mines. All the stock of the Cananea Consolidated Copper Company, however, was immediately transferred to the Greene Consolidated Copper Company, a West Virginia corporation, of which William C. Greene was president (*see Finding*, p. 146), which went on with the working and development of the mines. These facts are all alleged in plaintiffs' bill of complaint and not denied by the answers or otherwise.

All this occurred prior to November 26th, 1899, when the first of the deferred payments under the Mitchell-Greene contract fell due.

As soon as Greene had got into possession of the property, he claimed that unless the payment of $37,500, which became payable on November 26th, 1899, was made punctually on that day, all the rights of the Cobre Grande Company under that contract would become forfeited, and that he would then be entitled to receive from the Phoenix National Bank the title deeds which had been placed in escrow. Thereupon Cobre Grande Copper Company on November 25th, 1899, brought a suit in the District Court of Maricopa County to restrain the delivery of the deeds to Greene and an adjudication of their rights under the contract, the company claiming that Greene could not enforce any forfeiture under his contract as long as he had violated the conditions of it on his own part, by ejecting the company from the property and refusing to allow them to work and develop it. In this action in Maricopa County a preliminary injunction was granted by Judge Street, November 25, 1899, and after argument was retained by him (*see exhibit injunction, Record,* p. 93; *decision continuing same,* pp. 111-117; *Finding,* p. 195).

The Cobre Grande Copper Company also brought suits in New York and in Texas to replevy matte made from ores taken from the mines, and proceeded before the Courts of Mexico to obtain restitution of the mines themselves (*see Findings, IV and IX,* pp. 148, 151).

In October, 1900, the Maricopa County suit came on for trial before Judge Street, and after the hearing his decision was reserved (*Finding,* p. 147; *Judgment Roll,* pp. 111-118).

Meantime in 1900 various pooling arrangements were entered into whereby a majority of the stock of the Cobre Grande Company was put in the hands of one E. B. Gage (afterwards president of the company) as a trustee to hold the same, together with the object of raising money thereon to prosecute these litigations either by sale of the stock or otherwise. Hallenborg endeavored with others

"make those funds trust funds which in other "circumstances are as much the absolute property "of the corporation as any man's property is his."

BRADLEY, *J.*, in *Graham* v. *LaCrosse & M. R. Co.*, 102 U. S., 148, 161.

See also

Mellen v. *Moline Iron Works*, 131 U. S., 352.
Chicago M. & St. P. R. Co., v. *Third Nat. Bank*, 134 U. S., 276.
Wabash, St. L. & P. R. Co. v. *Ham*, 114 U. S., 587, 594.
Morgan County v. *Allen*, 103 U. S., 498, 509.
2 Story Eq. Jur., Sec. 1252.
1 Perry on Trusts, Sec. 242.

THIRD POINT.

THE COURT BELOW HAD POWER TO APPOINT A RECEIVER OF THE COBRE GRANDE COPPER COMPANY AND UPON THE FACTS PROVED IT WAS ITS DUTY TO DO SO.

The opinion of Judge Sloan shows that his refusal to appoint a receiver was founded largely upon his doubt of the power of the Court. He says (p. 56):

"* * * In the view of the Court there is sufficient doubt of the power of the Court to appoint "a receiver where no other relief is asked for, or "can be granted under the pleadings or facts to "cause it to hesitate before exercising its discretion and appointing such a receiver and to be "satisfied that no other remedy is available to "plaintiffs for the preservation of their rights as "minority stockholders."

The Supreme Court of Arizona held without deciding the question of power that to refuse to appoint a receiver was a wise exercise of discretion (p. 173).

In the State of New York, on the other hand, the Supreme Court at Special Term appointed a receiver in a similar action brought by Hallenborg and the power and duty of the Court to do so was affirmed by the Appellate Division of the Court.

The Court there said:

> "It needs no refinement of the decisions to show "that the case thus presented is one for equitable "cognizance. Within all of the authorities, a "court of equity in the proper jurisdiction should "intervene under such circumstances for the pro- "tection of the stockholders and creditors, both by "injunction and by the appointment of a receiver "to represent the company, since the directors, by "thus grossly abusing their trust, have become dis- "qualified to act. (*Treadwell* v. *United Verde* "*Copper Co.*, 47 App. Div., 613; *Pondir* v. *N. Y.*, "*L. E. & W. R. R.*, 72 Hun, 384; *Fennessy* v. *Ross*, "90 Hun, 298, 5 App. Div., 342; *F. L. & T. Co.* v. "*N. Y. & N. R. Co.*, 150 N. Y., 410, 425, 430; *Sar-* "*anac & Lake Placid Ry. Co.* v. *Arnold*, 167 N. Y., "368, 374; *Pierson* v. *Concord R. Co.*, 62 N. H., 537; "*Wayne Pike Co.* v. *Hammons*, 129 Ind., 368; "*Haywood* v. *Lincoln Lumber Co.*, 64 Wis., 639; "*Miner* v. *Belle Isle Ice Co.*, 93 Mich., 97; *Menier* v. *Hooper's Telegraph Works*, Law Rep., 9 Ch. "App., 350; *Beach on Receivers*, 2d ed., sec. 86; "*Cook on Corporations*, vol. 2, secs. 650, 662, vol. "7, sec. 8269; *Perry on Trusts*, sec. 427)."
>
> *Hallenborg* v. *Greene* (decided December, 1901), 66 N. Y., App. Div., p. 596.

There is not in the State of New York, any more than in the Territory of Arizona, any special statute authorizing a court of equity to appoint a receiver of a corporation for the fraud or mismanagement of the directors, and the appointment in New York was made under the general power of the Court conferred by its general jurisdiction in law and equity.

The Arizona Court has the same powers as every court of equity throughout the country. Jurisdiction in equity has been specially conferred upon it by the organic law of Arizona, it being provided by the United States Rev. Stat., §1868, that:

> "The Supreme Court and the District Courts "respectively of every territory shall possess "chancery as well as common-law jurisdiction."

Nor is there in the Arizona statutes anything to restrict the power of the court to grant a receiver in a case like this.

The statute provides (§1532, Revision 1901) that:

> "Judges of the District Court in term time or "in vacation may appoint a receiver in suits pend- "ing in said courts, when no other adequate rem- "edy is given by law for protection and preserva- "tion of property or the rights of parties therein "pending litigation in respect thereto."

And by §1541:

> "In all matters relating to the appointment of "receivers and to their powers, duties and liabili- "ties and the powers of the Court in relation there- "to the rules of equity shall govern whenever the "same are not inconsistent with the provisions of "this title."

All the text writers recognize the power of a court of equity to appoint a receiver of a corporation in case of fraud or mismanagement of directors.

In *Foster's Fed. Prac.* (2nd. ed.), p. 397, it is said:

> "Independently of statutory authority, a court "of equity will ordinarily appoint a receiver of the "property of a corporation in only seven cases. "* * * Thirdly. At the suit of persons inter-

"ested, whether as stockholders or creditors, in the "property where there is a breach of duty by the "directors and an actual or threatened loss."

In *Beach on Receivers* (2nd ed.), §86, it is said:

"The courts have not the power to appoint re- "ceivers to wind up the affairs of corporations, in "the absence of statutory provisions, but if the "property of a corporation is being mismanaged "and is in danger of being lost to the stockholders "and creditors through collusion and fraud of its "officers and directors, or mismanagement and "waste, courts of equity have inherent power to "appoint receivers."

In *Gluck & Becker on Receivers of Corporations*, §9, it is said:

"The inherent power of a court of equity to "appoint a receiver of the property of a corpora- "tion at the instance of one or more stockholders, "charging fraud and mismanagement on the part "of the officers in charge to the imminent danger "of the interests of such stockholders, is now too "well settled to admit question."

Earle v. *Seattle, L. S. & E. R. R. Co.* (56 Fed. Rep., 909), was an action by minority stockholders to annul a contract entered into in the name of the corporation with another railroad company. A majority interest in the stock of the railroad company had been purchased by a competitor, which thereby secured the control of the Board of Directors who then executed a traffic agreement whereby the entire control of the franchises and property of the corporation was surrendered to its rival. It was *held* that the minority stockholders in the railroad company could maintain a bill to annul the contract and a receiver was appointed in the action for the purpose of protecting their rights. The Court said (p. 914):

"These proceedings are illegal and violations "of the contract rights of the complainants as "stockholders, and entitle them to proper relief. "In my judgment they are entitled to an account- "ing, as prayed for in their bill and a fair adjust- "ment of the rights of all parties will be facili- "tated by the appointment of a receiver."

Aiken v. *Colo. River Irrigation Co.* (72 Fed. Rep., 591), was a suit of stockholders against the corporation and its directors. It was alleged that the directors were tools of and under the control of one of their number, who profited by certain frauds alleged and who maintained his control by means of spurious stock. It was *held* that the appointment of a receiver to collect and preserve the property of the corporation to meet the charges which the plaintiffs sought to establish was a proper remedy. The Court thus described the action in which the application was made:

"The bill does not ask a dissolution of the cor- "poration, or a statutory receivership to wind up "its business. All that it seeks to accomplish "through the receiver is the collection into his "hands and preservation of the property of the "corporation to meet the equitable charge or lien "which the plaintiffs insist they will ultimately es- "tablish against such property."

In *Pierson* v. *Concord Railroad Company* (62 N. H., 537), it was found that the directors representing a majority of the stock were incompetent to represent that company by reason of their having adverse interests in other contracts. The Court appointed a trustee to represent the Concord Railway Company in all its dealings and litigation with the Upper Roads, saying:

"The law does not suffer a trust to fail for want "of a trustee. * * * In this case the failure "would be partial. The trustees, namely, the di- "rectors of the Concord Railroad, are disabled to

"perform their official duty * * * only as "far as dealings between that and the upper com- "panies are concerned."

Wayne Pike Company v. *Hammons* (129 Ind., 368), was an action by minority stockholders against the corporation and its officers to compel an accounting and to obtain the appointment of a receiver. The complaint charged the officers with mismanagement and favoritism. It was *held* that a receiver should be appointed under the statute which empowered the Court to appoint receivers whenever it might be necessary to secure justice to the parties.

State ex rel. Telegraph Company v. *Second Jud. Dist. Court of Silver Bow County* (15 Mont., 324; 48 Am. St. Reps., 682), was a proceeding by *certiorari* to review the action of the Court in appointing a receiver, the contention being that the Court had no jurisdiction to do so. The action in which the receiver was appointed was between two Montana corporations, which were organized to carry on messenger business in Butte. They united their interests and later the defendants got control, and had since absorbed the profits and made notes secured by the franchises to one Puddington, ostensibly to purchase a franchise, but really to deprive the plaintiffs of all their interests by foreclosure. In this action the Court had ordered the appointment of a receiver *pendente lite*, for the purpose of protecting the interests of the minority stockholders. The Court said:

"We are fully aware of the reluctance of courts "of equity to interfere by receivership in the man- "agement of corporations, or to take the manage- "ment from trustees elected by the shareholders "* * * But the case before us is not an ordi- "nary one. * * * It is difficult to imagine "a case more thoroughly saturated with fraud. "* * * They (the directors) intended to buy "a worthless franchise to wipe the corporation out. "Here interference is essential to the attainment

"of justice and essential to the protection of the "corporate rights. To allow such a proceeding, it "seems to us, would shock the conscience of the "most indifferent court."

In *Haywood* v. *Lincoln Lumber Company* (64 Wis., 639), a receiver of the corporation had been appointed at the instance of a stockholder for the purpose of preserving the corporate property against loss through the collusion and fraud of its officers and directors. A question arose as to the jurisdiction of the Court to appoint him. The Supreme Court *held* that the facts were such as to justify and require the appointmemnt. The Court said:

"* * * Within the general powers of a court "of chancery preserved in the revised statutes, "this was a proper case for an injunction and re- "ceiver both. The property of the company was "being mismanaged and was in danger of being "lost to the stockholders and creditors through the "collusion and fraud of its officers and directors. "The only place of safety for the business and "property of the company was in the 'hand' of the "Court through a receiver *pendente lite*. A "stronger case for a receiver could scarcely be "made."

In *Re Lewis* (52 Kans., 660), was an application for a writ of *habeas corpus* challenging the power of the district court to appoint a receiver in a stockholders' action where mismanagement by the president alone was charged. The Court appointed the receiver and Lewis refused to turn over the property to him, claiming that the Court was without jurisdiction to appoint a receiver in such a case. The Court sustained the appointment. It said:

"The facts alleged if sustained would seem to "justify a court of equity *apart from statutory* "*provision*, in appointing a receiver to protect the "interests of stockholders against the malfeasance

"of the officers in charge of the corporate business "and their fraudulent misapplication of its prop- "erty and funds."

In Fisher v. *Concord Railroad Company* (50 N. H., 200), it appeared that a conductor who was also a stockholder, being prosecuted by the railroad company for embezzlement, organized a movement to buy out the stock of the company and to elect new directors who should withdraw the suit at his wish. A receiver was appointed for the purpose of protecting the interests of the minority stockholders in that prosecution.

Cameron v. *Groveland Improvement Company* (20 Wash., 169; 54 Pac. Rep., 1128), was a suit in equity by minority stockholders for themselves and any others who might join to compel the directors to account and for the appointment of a receiver *pendente lite* on charges of fraud and mismanagement by the stockholders. It was *held* that a receiver was properly appointed for the purpose of protecting the minority interests.

In *Miner* v. *Belle Isle Ice Co.* (93 Mich., 97), the prayer of the bill was for the appointment of a receiver and an accounting by the trustees and officers and for the winding up of the affairs of the corporation. The complaint alleged gross mismanagement on the part of the president. The Court considered that the case was a proper case for the appointment of a receiver and said:

"The simple statement of the facts ought to de- "cide the case (p. 108).

"The general rule undoubtedly is that courts "have no power to wind up a corporation in the "absence of statutory authority. This rule is, "however, subject to qualifications (p. 112). " * * * The present case furnishes an in- "stance of gross breach of trust. The law requires "of the majority the utmost good faith in the "control and management of the corporation as to

"might divide the whole assets of the company "and pass a resolution that everything must be "given to them, and that the minority should have "nothing to do with it. Assuming the case to be "as alleged in the bill, then the majority have put "something into their pockets at the expense of "the minority. If so, it appears to me that the "minority have a right to have their share of the "benefits ascertained for them in the best way "that the court can do it and given to them."

Farmers' Loan & Trust Company v. *New York & Northern R. R. Co.* (150 N. Y., 411), was an action to foreclose a mortgage. This action was instigated by a rival corporation, which had obtained control of the majority of the stock of the mortgagor corporation, and for the purpose of effecting a transfer of the property of the mortgagor to its rival. The Court *held* that this could not be done, saying (p. 431):

"A corporation purchasing the majority of the "stock of another competing one cannot obtain "control of its affairs, divert the income of its "business, refuse business which would enable the "defaulting company to pay its interest, and then "institute an action in equity to enforce its ob- "ligations, for the avowed purpose of obtaining "entire control of its property to the injury of "the minority stockholders. Such a course of "action is clearly opposed to the true interests of "the corporation itself, plainly discloses that one "thus acting was not influenced by any honest de- "sire to secure such interest, but that its action "was to serve an outside purpose, regardless of "consequences to the debtor company, and in min- "ority of the shareholders say in effect that a "manner inconsistent with its interest and the in- "terest of its minority stockholders."

In *Jackson* v. *Ludeling* (21 Wall., U. S., 616), the local managers and officers of a corporation of which the

greater portion of the stock was held by non-residents obtained an order of sale under a mortgage to secure the bonds and proceeded in a hasty and secret way to sell the railroad and buy it at a price much below its value. The conditions of sale were made such as to render it difficult for persons generally to purchase, and the whole proceeding was attended with evidence of gross disregard of the interest of the bondholders, and of course of the stockholders also. It was *held* that the managers and officers of the corporation were trustees alike for the stockholders and its creditors, and that they had no right to enter into or participate in any combination, the object of which was to divest the company of its property, and obtain it by sale at a sacrifice.

In *Ervin* v. *Oregon Railroad & Navigation Co.* (27 Fed. Rep., 630), a number of stockholders combined to constitute themselves a majority to control the corporation, and it was *held* that they became for all practical purposes the corporation itself and assumed the trust relation of the corporation to its stockholders and that they could not make a profit out of it at the expense of those whose rights are the same as their own; that such a profit was a constructive fraud upon the minority stockholders, which a court of equity would remedy.

See also:

Rogers v. *Nash, C. & St. P. R. Co.*, 91 Fed. Rep., 299.

Eldred v. *Am. Palace Car Co.*, 96 Fed. Rep., 59.

De Neufville v. *N. Y. & Northern R. Co.*, 81 Fed. Rep., 10.

Henshaw v. *Salt Riv. Canal Co.* (Ariz.), 54 Pac. Rep., 577.

Sage v. *Culver*, 147 N. Y., 241; affirming 71 Hun, 42.

Barr v. *N. Y., Lake Erie & W. Co.*, 96 N. Y., 444.

Wright v. *Oroville Mining Co.*, 40 Cal., 20.

Smith v. *Dorn*, 96 Cal., 73.

Goodwin v. *Cincinnati, etc., Canal Co.*, 18 Ohio St., 169.
Rogers v. *Lafayette Agricultural Works*, 52 Ind., 297.
Parson v. *Concord R. R. Co.*, 62 N. H., 537.
Higgins v. *Lansing*, 154 Ill., 301.
Forrester v. *Boston & Mont. Consol. Copper Co.* (Mont.), 55 Pac. Rep., 353.
Mason v. *Harris*, 11 Chan. Div., 97.

SECOND POINT.

UNDER THE AUTHORITIES THE AGREEMENT OF DECEMBER 12, 1900, CONSTITUTED A WRONG AGAINST THE MINORITY STOCKHOLDERS AND CREDITORS, AND WAS FRAUDULENT AS TO THEM.

The agreement on its face constitutes one of the most glaring instances of a barefaced defiance by a majority combination of the rights of minority stockholders and actual creditors that can be found in the books. It unites several species of flagrant wrongs upon them. By its terms as approved by the offending directors the offices of the corporation are bartered away for money; its control is given to its enemies; it is stripped of its property and driven out of business. The creditors and minority stockholders are left absolutely without prospect of recovering anything for their claims or of future value for their stock. The corporation is practically dead if that agreement stands.

And first: The bartering of the offices provided for in the agreement of December 12 was illegal.

In *Fennessy* v. *Ross*, N. Y. Supreme Court (90 Hun, 298), the action was for damages for failure to pay for certain shares of stock in three companies. It appeared in addition that the parties had agreed that the defendant should have the management of the three companies

at a certain salary and that after the expiration of one year he should have a larger salary and that he should have equal representation in the boards of directors of the three companies and should be made vice-president and general manager of them, and that in case either party should desire to sell his holdings of stock in the three companies he should give the other party the first opportunity to purchase at a price named. It was *held* that the contract was an attempt to barter away the offices and management of the corporations and was void as against public policy.

In *Guernsey* v. *Cook* (120 Mass., 342), it was *held* that a contract by which a shareholder in a corporation, in consideration of the purchase of a part of his stock, at a price named, agreed to secure to the purchaser the office of treasurer in the corporation at a fixed salary and in case of his removal to repurchase the stock, was void as against public policy and was a fraud on the other members of the corporation.

In *Wilbur* v. *Stopel* (82 Mich., 344), it was *held* that the plaintiff could not enforce a contract in which it had been agreed that if the plaintiff would purchase certain shares of the defendant, a part of the stockholders would make him general manager, and in case he should be ousted from that office would buy his stock. The defendants were directors of the corporation. The Court declared such contracts to be against public policy, as necessarily placing the directors in a position where their interests conflicted with the interests of the corporation.

In *Sugden* v. *Crossland* (3 Sm. & Gif., 192), Horsefield was a trustee under a will. Crossland paid him £75 to withdraw from the trust and have Crossland appointed in his place. It was held that the £75 belonged to the estate, and judgment was given against Crossland.

In *McClure* v. *Law* (161 N. Y., 78), money was received from an outsider by a director and a president

of a life insurance company for procuring the outsider and his friends to be elected directors and given the control and management together with the property and effects of the corporation. It was held that the money so received was money obtained by virtue of his office, for which he must account to the corporation.

To the same effect *Gaskell* v. *Chanters,* 28 Beaver, 360.

In *Cook on Corporations* (Sec. 650) it is said:

"It is a well-established principle of law that "a director commits a breach of trust in accepting "a secret gift or secret pay from a person who is "contracting or has contracted with the corpora- "tion, and that the corporation may compel the "director to turn over to it all the money or prop- "erty so received by him."

In *Perry on Trusts* (Sec. 427), it is said:

"Trustees hold a position of trusts and confi- "dence. The legal title of the trust property is "in them; and generally its whole management "and control is in their hands. * * * They "cannot use the trust property nor their relation "to it for their own personal advantage. All the "power and influence which the possession of the "trust fund gives must be used for the advantage "and profit of the beneficial owners and not for "the personal gain and emolument of the trus- "tee."

And second: The contract of December 12 is illegal because it dissipates the assets of the corporation. These assets consisted of valuable mining property in Sonora; of copper matte in New York and elsewhere and of *choses in action* concerning these properties. All these are in effect given away or abandoned. The suits to recover these properties were to be dismissed. In these suits

more than $20,000 had been expended and $50,000 additional liability has been, it is claimed, incurred. Therefore, the dismissals alone represented $70,000 which would have to be expended in case the suits were recommenced. But in effect the suits and claims were intended to be abandoned since the control was given to the adversary. Therefore, mining property of upwards of $1,000,000 in value, perhaps $50,000,000, was given away. The agreement further provides that the copper matte in New York was to be turned over to Greene and his associates.

No consideration was payable to the corporation for this immense concession and transfer to its adversary.

All this was illegal. Any text book on the subject is sufficient authority for this plain proposition.

In *Thompson's Commentaries*, Sec. 4014, the law is thus stated:

> "It is the duty of the directors and other officers "of a corporation to preserve its property as a "trust fund of what they are the guardians, and "to administer it for the purposes of the trust. "They have no right to divide the corporate prop- "erty among themselves or give it away without "consideration."

The claim that the Cobre Grande Company was in financial difficulties at this time does not change the legal situation.

Directors cannot wreck even a bankrupt corporation in this way. The assets and property of insolvent corporations constitute a trust, which the directors as trustees must honestly administer for the benefit of all concerned.

> "When a corporation becomes insolvent, it is so "far civilly dead, that its property may be ad- "ministered as a trust fund for the benefit of its "stockholders and creditors. A court of equity "at the instance of the proper parties will then

> " and highly reprehensible, and the learned Dis-
> "trict Judge, who was then holding the Circuit
> "Court, undoubtedly suffered the judgment *pro*
> "*forma* to be entered under the impression that
> "there was in fact a controversy between the plain-
> "tiff and defendant and that they were proceed-
> "ing to obtain a decision upon a disputed ques-
> "tion of law, in which they had adverse interests.
> "A judgment in form, thus procured, in the eye of
> "the law is no judgment of the court. It is a
> "nullity, and no writ of error will lie upon it."

The order of the Supreme Court dismissing the writ of error contained the following:

> "It appearing to the Court here, from the af-
> "fidavit and other evidence filed in the case by
> "Mr. Moor, in behalf of third persons not parties
> "to this suit, that there is no real dispute between
> "the plaintiff and defendant in this suit, but
> "on the contrary, that their interest is one and the
> "same, and is adverse to the interest of the per-
> "sons aforesaid, it is the opinion of this court,
> "that the judgment of the Circuit Court entered
> "*pro forma* in this case is a nullity and void, and
> "that no writ of error will lie upon it. On con-
> "sideration whereof, it is now here ordered and
> "adjudged by this court, that the writ of error
> "be, and the same is, hereby dismissed," etc.

In *Chamberlain* v. *Cleveland* (1 Black, U. S., 419; Lawyers' Ed., Vol. 17, p. 93), Cleveland as a judgment creditor of a railroad company in a suit in equity had procured a decree setting aside a fraudulent conveyance made to Chamberlain. Subsequently, by the intervention of a friend, Chamberlain purchased Cleveland's judgment and then took an appeal from the decree setting aside the transfer to him for the purpose of injuring other judgment creditors of the debtor.

Certain persons not parties to the record asked to intervene and moved the Court to dismiss the appeal on the

ground that it was not conducted by parties having adverse interests, but for the purpose of obtaining a decision of the Court to affect the interests of persons not parties. Mr. Justice Grier, in delivering the opinion of the Court dismissing the appeal, said:

> "There is no material difference between this "case and that of Lord *v.* Veazie, 8 How., 254, "when the whole proceeding was justly rebuked "by the Court as 'in contempt of the court and "highly reprehensible.' * * * It is plain that "this is no adversary proceeding, no controversy "between the appellant and the nominal ap- "pellee. * * * We repeat, therefore, what "was said by the Court in that case: 'Any at- "tempt by a mere colorable dispute, to obtain the "opinion of the Court upon a question of law, "which a party desires to know for his own in- "terest or his own purposes, when there is no "real and substantial controversy between those "who appear as adverse parties to the suit, is an "abuse which courts of justice have always repre- "hended, and treated as a punishable contempt of "court."

In *East Tennessee R. R. Co.* v. *Southern Telegraph Co.* (125 U. S., 695; Lawyers' Ed., Vol. 31, p. 853), a writ of error had been taken to the United States Supreme Court and it was suggested to the Court after the record was filed that there was no real controversy, as the Western Union Telegraph Company had acquired the interest of both parties to the suit, and the Court thereupon made an order that the plaintiff in error show cause why the writ should not be dismissed, and two attempts were made by the plaintiff in error to do so, but the showing having failed to satisfy the Court that a real controversy existed, the writ was dismissed. In delivering the opinion of the Court dismissing the writ, Mr. Justice Miller said:

> "It was suggested by a letter from counsel em- "ployed on one side of this suit that his party had

"sold out the interests which it had to the other "party, who was prosecuting it now and was *dom-* "*inus litis* on both sides. A ruling was made some "time ago before the death of the late Chief "Justice, in effect that there was sufficient evidence "to that effect to require the case to be dismissed, "unless the side now prosecuting it for decision "would show satisfactory evidence that it was a "*bona fide* suit. Two attempts have been made "and we are agreed in the opinion that they are "both failures, and that the original order should "now be carried out, dismissing the case on the "grounds set forth in the opinion of the Chief "Justice delivered at the time."

In *The South Spring Hill Gold Mining Co.* v. *The Amador Medean Gold Mining Company* (145 U. S., 300; Lawyers' Ed., Vol. 36, p. 712), a writ of error had been taken from a judgment of the Circuit Court of the Northern District of California, and upon the case coming on for argument in the Supreme Court, Hon. Goerge S. Boutwell, who was counsel for the plaintiff in error, called the attention of the Court to the fact that since the decision of the Circuit Court the control of both the corporations, parties to the suit, had come into the hands of the same persons, but that there was a minority of stockholders in the Amador Medean Gold Mining Company who retained the interest that they had at the time the decision was rendered; that the two corporations were still in existence and organized and that the present managers and owners of the property were anxious that the question should be decided in order that the minority of the stockholders might receive whatever, by the finding of the Court, would be due them. The Court, by Chief Justice Fuller, said:

"We cannot, however, consent to determine a "controversy in which the plaintiff in error has "become the *dominus litis* on both sides. We as- "sume that this is not an agreed case gotten up by "collusion; but the litigation has ceased to be be-

"tween adverse parties, and the case therefore "falls within the rule applied where the contro- "versy is not a real one."

Citing:

American Wood Paper Co. v. *Heft*, 75 U. S., 8 Wall., 333.
Cleveland v. *Chamberlain*, 66 U. S., 1 Black, 419.
Lord v. *Veazie*, 49 U. S., 8 How., 251.
Washington Market Co. v. *District of Columbia*, 137 U. S., 62.

In *Black on Judgments* (Sec. 508), it is said:

"But to create an estoppel it is essentially neces- "sary that there be a genuine and honest judg- "ment. It must not be merely collusive or simu- "lated. A judgment or sentence we are told is a "judicial determination of a cause agitated be- "tween real parties, upon which a real interest has "been settled. In order to make a sentence there "must be a *real interest, a real argument, a real "prosecution, a real defense, a real decision.*"

In the celebrated *Gaines* case the U. S. Supreme Court held that a prior judgment in *Patterson* v. *Gaines* could not be invoked as binding on the parties because the action was amicable and the judgment collusive and therefore although it had been affirmed in the U. S. Supreme Court it was disregarded there when offered as evidence of an adjudication. *Judge Taney* summarized his conclusions in these words:

"That the decree of this Court in Charles Pat- "terson's case does not affect the defendants for "two reasons: 1st, because they were no parties "to it; and 2nd, *because it was no earnest contro- "versy.*"

Gaines v. *Relf*, 12 How. (U. S.), 472, 539.

In *Humes* v. *Scruggs* (94 U. S., 22, 24), it was held that an assignee in bankruptcy was not bound by a decree rendered in a suit against the bankrupt where there were indications of collusion. The Court said:

> "There would be little difficulty in making and "sustaining fraudulent transfers of property if "the parties could by a subsequent suit between "themselves so fortify the deed that no others "could attack it."

In *Johnson* v. *Waters* (111 U. S., 640), it was held that a creditor might maintain an action to set aside a fraudulent sale of his debtor's property although he was an innocent party to the proceedings. *Judge Bradley* said (p. 667):

> "The Court of Chancery is always open to hear "complaints against it, whether committed *in pais* "or in or by means of judicial proceedings. In "such cases the Court does not act as a court of "review, nor does it inquire into irregularities or "errors of proceeding in another court; but it will "scrutinize the conduct of the parties and if it "finds that they have been guilty of fraud in ob"taining a judgment or decree, it will deprive them "of the benefit of it and of any inequitable ad"vantage which they have derived from it."

In *Bissit* v. *Kentucky River Co.* (15 Fed. R., 353) it was held that a judgment obtained by a creditor against a corporation was not binding upon the stockholders where it had been carelessly defended and was evidently collusive.

To the same effect was *Wilson* v. *Keissel* (Supreme Court of Utah, 1894), 35 Pac. Rep., 488.

Other cases holding that there can be no valid judgment where there is no real and earnest controversy between the parties to the action are the following:

Fletcher v. *Peck*, 6 Cranch, 87.

State of California v. *S. P. & T. R. R. Co.*, 14 U. S., 308.

Little v. *Bowers,* 134 U, S., 547.
Singer Mfg. Co. v. *Wright,* 141 U. S., 696.
County of Dakota v. *Glidden,* 113 U. S., 222.
County of San Mateo v. *S. P. R. R. Co.,* 116 U. S., 138.

The circumstances under which the judgment of dismissal was signed by Judge Street also show conclusively that his decision was merely the registering of an agreement entered into by the parties; that the judgment was prepared by agreement between the two sets of attorneys, both of whom were controlled by Greene, and submitted to Judge Street for signature in pursuance of the agreement already made that the suit should be dismissed. It appears by the testimony of Mr. Jamison that the case was re-submitted to Judge Street on Saturday, April 13th, 1901 (p. 89). The judgment was filed on April 15th, 1901, at 11 A. M. (p. 118). It does not appear when, if ever at all, Judge Street announced any decision. All that appears is that there was an agreement to re-submit the case and that Judge Barnes, Mr. Greene's attorney, then prepared a judgment dismissing the complaint upon the merits and forwarded it to Mr. Chalmers, supposed to represent the Cobre Grande Co., who marked it "O. K.," and presented it to Judge Street, who signed it in time to have it entered on April 15th, 1901, at 11 A. M.

Mr. Chalmers appears in this action as attorney for the defendants asking a dismissal of the complaint (p. 72) and was a witness on the trial for defendants (p. 84) and assisting in the defense as counsel (p. 57) and was elected a director in the Greene interest on April 3, 1901, when the old board resigned (p. 58).

All the circumstances not only justify but require the Court to hold that this judgment was merely the agreement of the parties, and a judgment entered by consent to avoid the effect of the injunction restraining the dismissal of the action. Whether or not Judge Street was a party to this collusive judgment is entirely immaterial. The material fact is that there was no longer any real controversy between the parties; that the attorneys on

both sides were controlled by Greene and were simply engaged in carrying into effect an agreement for the dismissal of the suit which had already been made. If Judge Street was ignorant of the fact that the case had been settled between the parties, the attorneys who deceived him might be guilty of a contempt of Court. If he signed a judgment purporting to be upon the merits and to decide any real issues in the case when he was simply recording the agreement of the parties, he was either guilty of an inadvertence or of improper judicial conduct, but in neither event could he give any judicial weight or credit to the judgment.

FIFTH POINT.

THE FACT THAT PENDING THIS ACTION THE SITUATION HAS CHANGED SO THAT THE PLAINTIFF CAN NOT NOW BE GIVEN THE RELIEF TO WHICH HE WAS ENTITLED WHEN THIS ACTION WAS COMMENCED DOES NOT DEPRIVE THE PLAINTIFF OF THE RIGHT TO AN APPROPRIATE REMEDY UPON THE EXISTING FACTS.

The complaint filed demanded judgment restraining the Cobre Grande Copper Company and its officers from discontinuing or causing to be discontinued or dismissed the suits then pending; for a mandatory injunction to issue directing the Cobre Grande Copper Company to faithfully prosecute and pursue on its behalf all actions and proceedings for the recovery of its property; that the plaintiff be brought in and made a party plaintiff to said action and proceedings; that the defendants Greene and Mitchell be restrained from demanding or receiving from the Phœnix National Bank the papers and documents evidencing title to the properties and that the Phœnix National Bank be restrained from delivering said papers and that the plaintiff might have such other and further relief as may be just.

In discussing the complaint the District Court held that inasmuch as notwithstanding the preliminary injunction

obtained by plaintiff the defendants had succeeded in accomplishing the greater part of their fraudulent design; the actions against them had been dismissed and the title deeds delivered to Greene the plaintiffs could obtain no relief but the possible appointment of a receiver and even that was useless.

The decision of the Court upon this point necessarily proceeds upon the theory that if the legal situation at the time of its decree is not such as to bring the facts precisely within the complaint no remedy can be obtained. This is error. The defendants are within the jurisdiction of the Court and may be compelled to do justice to the plaintiffs. If they have since the commencement of this action improved their situation without right, to the prejudice of the plaintiffs, their situation can be restored as it existed at the commencement of the action, and the plaintiffs awarded such redress as is proper under the circumstances.

A court of equity, having obtained jurisdiction, may and generally does adapt the relief to the situation existing at the close of the litigation.

> *Dannert* v. *Osborn*, 140 N. Y., 30, 43.
> *Madison Ave. Baptist Church* v. *Oliver St. Baptist Church*, 73 N. Y., 82.
> *Worrall* v. *Munn*, 38 N. Y., 137.
> *Gay* v. *Gay*, 10 Paige, 369.
> *Sherman* v. *Foster*, 158 N. Y., 587.
> *Peck* v. *Goodberlett*, 109 N. Y., 189.

> "The right to judgment is not limited to the "facts as they exist at the commencement of the "action, but the relief administered is such as the "nature of the case and the facts as they exist at "the close of the action demand."
>
> MAYNARD, *J.*, in Pond *v.* Harwood, 139 N. Y., 111, 120.

In *Van Allen* v. *N. Y. El. R. R.* (144 N. Y., 174), plaintiff sought an injunction against a continuing trespass upon his property. At the time when he began the

"the minority (p. 116). * * * This corpora-
"tion has utterly failed of its purpose, not because
"of matters beyond its control, but because of
"fraudulent mismanagement and misappropria-
"tion of its funds. * * * A court of equity
"will not so far tolerate such a manifold violation
"of the rules of natural justice as to deny him the
"relief to which his situation entitles him."

In the exercise of its general jurisdiction the court in that case order the appointment of a receiver.

In all these cases the appointment was made upon the general principle that a court of equity has inherent power to appoint a receiver of a corporation to protect its stockholders whether a minority or otherwise, with or without statutory authority.

The cases cited below to show that a court of equity cannot appoint a receiver of a corporation without statutory authority therefor, when critically examined will be found to deal simply with the power to dissolve a corporation. Such were

Murray v. *Superior Court*, 129 Cal., 632.
Neal v. *Hill*, 16 Cal., 150.
French Bank Case, 53 Cal., 495.
Decker v. *Gardner*, 124 N. Y., 334.
Atty. Gen'l v. *Utica Ins. Co.*, 2 Johns. Ch., 375.

In none of these cases was there any allegation of fraud or breach of trust.

FOURTH POINT.

THE JUDGMENT ENTERED IN THE SUIT IN THE DISTRICT COURT IN MARICOPA COUNTY WAS COLLUSIVE AND VOID AND THE COURT BELOW ERRED IN GIVING ANY FORCE OR EFFECT TO IT.

In his decision Judge SLOAN says:

> "It was also shown that the action pending in "the District Court of Maricopa County was de- "cided and had gone to judgment. * * * (*Rec- "ord*, p. 50).
>
> "A receiver is asked for upon the grounds that "the action pending in this territory, at the time "of the institution of this suit, and which has since "been decided by the District Court of Maricopa "County, was one brought in good faith by the "Cobre Grande Copper Company to recover the "possession of the Mexican property, and that the "cause of action in said suit grew out of the al- "leged wrongful ouster from the possession of "said mining property by the defendants Greene, "Mitchell, and the Greene Consolidated Copper "Company that the agreement between Gage, as "president of the Cobre Grande Copper Company, "and as trustee for the holders of said 115,049 "shares of the stock of said Company, and the "Greene Consolidated Copper Company, in which "it was attempted to bind the Cobre Grande Cop- "per Company from further proceeding with the "said litigation and in which it was provided that "said suit should be discontinued and dismissed, "is fraudulent; first, because it provided for no "adequate consideration to be paid the Cobre "Grande Copper Company for its agreement to "abandon said litigation; and, second, that it pro-

"vided for large individual gains to be paid Gage "and the other directors of the Cobre Grande Cop- "per Company as a consideration for said agree- "ment.

"It is further contended as an additional reason "for the appointment of a receiver that the judg- "ment of the District Court of Maricopa County "is not an estoppel of record for the reason that "at the time of its rendition the Cobre Grande Cop- "per Company was under the control of said "Greene, its officers and directors having been "elected and appointed by him and in his inter- "ests, the directors and officers of the Cobre "Grande Copper Company at the date of the ex- "ecution of the Gage agreement, and in accord- "ance with the terms of said agreement having "resigned and their places having been filled as "aforesaid in the interests of said Greene and "against the interests of the minority stockholders "of said Company.

"The facts show that the suit brought by the "Cobre Grande Copper Company in the Maricopa "County District Court was brought to trial in "October, 1900; that the cause was vigorously "fought on the part of both plaintiff and defend- "ants in that cause; that after hearing the testi- "mony and the argument of the counsel the Court "took the case under advisement; that, pending the "decision, the agreement between Gage and the de- "fendant Greene, above referred to, was entered "into (*Record*, p. 51).

* * * * * * * * * * * * *

"The agreement further provided that the Cobre "Grande Copper Company should dismiss all suits "brought by it against Greene, Mitchell and the "Greene Consolidated Copper Company then pend- "ing in New York, Texas and Arizona; that in the "suit in Texas, the appeal taken by the Cobre "Grande Copper Company to the Supreme Court

"of that State should be dismissed, and the same "suit in the District Court should also be dis- "missed. It was also provided that in the suits "pending in the District Court of Maricopa "County, which had been submitted for decision, "that the order of submission should by consent, "be set aside, and that upon the final payments "being made, said suits should be dismissed (*Rec- "ord*, pp. 51, 52).

* * * * * * * * * * * * *

"The agreement further provided that, upon the "carrying out of its provisions with reference to "the purchase by the parties of the first part of "the Cobre Grande stock, the then directors of the "Cobre Grande Copper Company should resign "as directors and officers of said Company (*Rec- "ord*, p. 52).

* * * * * * * * * * * * *

"It further appears that, after the execution of "said agreement, counsel representing both sides "to the litigation pending in Maricopa County ap- "peared in court in accordance with the terms of "the agreement and procured an order setting "aside the submission theretofore made with the "right to have the case resubmitted therafter and "the decision had upon record already made.

"It further appears that, after the institution "of this suit, the same counsel notified the Judge "of said Court that the case was again submitted "and asked for a decision thereof; that thereafter "said District Court rendered its decision giving "judgment for the defendants in said action.

"It also appears that at the time of the said "re-submission of said cause under the terms of "said agreement the directors of the Cobre Grande "Copper Company, in office at the time of the exe- "cution thereof, had resigned and had been suc- "ceeded by directors elected by Greene and his "associates" (*Record*, p. 53).

We have quoted at length from the opinion of the Trial Judge because it embodies certain facts about which there is no dispute. These are as follows, viz.:

(1) Prior to the commencement of this suit an agreement had been made for the transfer of the control of the corporation to persons who had seized its assets, and who were then engaged in litigation as to the right to retain these assets.

(2) When the present action was begun, this litigation was still pending undetermined.

(3) After the commencement of this action and after the transfer of the control of the Cobre Grande Copper Company to its adversaries, the suit was re-submitted and a decision was rendered in favor of its adversaries.

The findings also show that the suit was decided April 15, 1900, four months after the agreement complained of had given Greene control of the litigation (p. 147), and the Record shows that it was two days after the present suit was started and the injunction had been served (p. 90).

The re-submission, as appears from the decision of Mr. Justice Sloan, was made when there was really only one party to the controversy, to wit, Greene and the Greene Consolidated Copper Company. The adjudication was obtained at the instance, not of those who truly represented the Cobre Grande Copper Company, or its minority stockholders, but at the instance of those who were opposed to it in the litigation. The re-submission was made by attorneys who had accepted compensation from the adversaries of the Cobre Grande Copper Company under this illegal contract and was made on behalf of those adversaries.

Every feature of the re-submission shows that at the time of the re-submission there was no true controversy between the parties to the submission. It was practically a request by both sides for a judgment in favor of the defendants. Under such circumstances the rule

is clearly laid down that a judgment rendered is a nullity and absolutely void.

In *Lord* v. *Veazie* (8 How., U. S., 251; Lawyers' Ed., Vol. 12, p. 1067), it appeared that one Moor, claimed the exclusive right of navigating the Penobscot River in Maine, under an act of the Maine Legislature, and that a railroad and canal company in which Veazie was a large stockholder also claimed the right of navigation. Veazie assigned some of his shares of stock to Lord with a covenant that the corporation had such right of navigation and then Lord brought a suit in the United States Circuit Court of Maine against him for a breach of this covenant. Upon an agreed state of facts a judgment *pro forma* in favor of Veazie was entered and Lord then took a writ of error to the United States Supreme Court. In the United States Supreme Court Moor made a motion to dismiss the appeal on the ground that it was a fictitious case got up between the parties for the purpose of settling legal questions in which he, the said Moor, was interested. The motion was granted and in the opinion of the Court delivered by *Chief Justice Taney*, it was said:

> "The Court is satisfied, upon examining the "record in this case, and the affidavits filed in the "motion to dismiss, that the contract set out in "the pleadings was made for the purpose of in- "stituting this suit, and that there is no real dis- "pute between the plaintiff and defendant. On "the contrary, it is evident that their interest in "the question brought here for decision is one and "the same, and not adverse; and that in these pro- "ceedings the plaintiff and defendant are attempt- "ing to procure the opinion of this court upon a "question of law, in the decision of which they "have a common interest opposed to that of other "persons, who are not parties to this suit. * * * "A judgment entered under such circumstances, "and for such purposes, is a mere form. The "whole proceeding was in contempt of the court,

action he held title to the premises. He conveyed the property prior to the trial. The Court held that the conveyance defeated the plaintiff's right to relief by an injunction, but did not deprive it of jurisdiction of the equitable action, saying:

> "When the jurisdiction has once attached, it is "not affected by changes which occur subsequent- "ly, so long as any cause of action survives, upon "the facts alleged, though such changes may affect "the nature and extent of the relief to which the "party may be entitled" (p. 179).

In *Kilbourne* v. *Supervisors, etc.* (137 N. Y., 170, 178), EARL, *J.*, said:

> "While in actions at law the whole cause of "action must have arisen before the commence- "ment of the action, and no relief can be given as "to anything which occurred subsequently, such is "not the rule in equitable actions. In such an ac- "tion the Court having obtained jurisdiction of "the parties and subject of the action *will bring its* "*relief down to the trial* and thus make an end of "the litigation, so far as it pertains to the matters "in controversy between the parties."

In the case of actions for specific performance of contracts for the sale of land, if it appears upon the trial that the defendant has for some reason always been unable to perform, but that fact is not known to the plaintiff at the time of the commencement of the action, the Court will grant a decree for simple damages because the plaintiff came into equity in good faith.

Holland v. *Worley*, 26 Chanc. Div., 578.
Cotton v. *Wyld*, 32 Bevan.
Betts v. *Nielson*, Law Rep., 3 Chanc. Appeals, 429.
Pratt v. *Law*, 9 Cranch, 456, 494.
Mobile v. *Kimball*, 102 U. S., 691.

Milkman v. *Ordway*, 106 Mass., 232.
Taintor v. *Cole*, 120 Mass., 162.
Wonson v. *Fenno*, 129 Mass., 403.
Ostrander v. *Webber*, 114 N. Y., 95.
Beck v. *Allison*, 56 N. Y., 366.
N. Y. Ice Co. v. *Northwestern Ins. Co.*, 23 N. Y., 357.
Pomeroy Eq. Jur. (2nd Ed.) §§181, 237, 238, 1410.

Jurisdiction of an action to restrain the infringement of letters patent depends upon the existence of valid letters patent at the time of the commencement of the suit, but the fact that the letters have expired before time of trial and hearing will not defeat the right to relief, and the Court will decree an accounting notwithstanding the expiration of the patent.

Adams v. *Howard*, 19 Fed. Rep., 317.
Gottfried v. *Moerlein*, 14 Fed. Rep., 170.

Even if the relief to be awarded under the changed circumstances were novel and without precedent, it would still be within the power of the Court to award the relief in its decree. Powers of courts of equity are not limited and defined. They are sufficiently large to enable them to afford the relief which equity demands under any circumstances which may develop.

Equity has power to contrive new remedies to meet the varying circumstances.

Nashville C. & St. Louis R. Co. v. *McConnell*, 82 Fed. Rep., 65, 76.

In *Toledo A. A. & N. M. Ry. Co.* v. *Penn. Co.* (54 Fed. Rep., 746, 751), the Court said:

> "It is said the orders issued in this case are "without precedent. Every just order or rule "known to equity courts was born of some emer-

"gency, to meet some new conditions, and was "therefore, in its time, without a precedent. If "based on sound principles and beneficient results "follow their enforcement, affording necessary re- "lief to the one party without imposing illegal "burdens on the other, new remedies and unpre- "cedented orders are not unwelcome aids to the "Chancellor to meet the constantly varying de- "mands for equitable relief."

In *Joy* v. *St. Louis* (138 U. S., 50), BLATCHFORD, *J.*, said:

"It is one of the most useful functions of a court "of equity that its methods of procedure are cap- "able of being made such as to accommodate them- "selves to the development of the interest of the "public in the progress of trade and traffic by new "methods of intercourse and transportation."

In *Union Pac. R. Co.* v. *Chicago, R. I. & P. R. Co.* (163 U. S., 564, 601), FULLER, *C. J.*, said:

"It must not be forgotten that in the increasing "complexities of modern business relations equi- "table remedies have necessarily and steadily been "expanded and no inflexible rule has been per- "mitted to circumscribe them. As has been well "said equity has contrived its remedies, 'so that " 'they shall correspond both to the primary right " 'of the injured party, and to the wrong by which " 'that right has been violated;' and 'has always " 'preserved the elements of flexibility, and expan- " 'siveness, so that new ones may be invented, or " 'old ones modified, in order to meet the require- " 'ments of every case, and to satisfy the needs of " 'a progressive social condition in which new " 'primary rights and duties are constantly aris- " 'ing and new kinds of wrongs are constantly " 'committed.' Pom. Eq. Jur., §111."

When the action was commenced, the deeds were still in the Phœnix Bank and no judgment had been rendered in the Maricopa County suit, and the Court had power to restrain the delivery of those deeds and prevent any further action being taken in the suit until the minority stockholders could be properly represented in it. At the time of the trial the deeds had been delivered in pursuance of a judgment collusively entered in the Maricopa County suit, and the plaintiffs should have been awarded relief framed to the changed circumstances, *i. e.*, the collusive judgment should have been vacated and set aside; the deeds ordered to be returned to the Phœnix Bank; and a receiver appointed, who could become a party to and control the Maricopa County suit, and have that controversy litigated upon its merits, and, if necessary, carried by appeal to the Supreme Court of the United States, where a cause of that magnitude would ordinarily go for final decision.

SIXTH POINT.

THE APPOINTMENT OF A RECEIVER WAS NOT ONLY NECESSARY AND REQUIRED BY THE PROOFS, BUT WAS ESSENTIAL TO FULL AND ADEQUATE RELIEF TO THE PLAINTIFFS.

The Court below in its decision says that full relief can be granted to the plaintiffs in independent actions brought by them to redress the wrongs done to the corporation and therefore the appointment of a receiver of the corporation is not necessary to do them justice.

If this be so, it would be no answer to the prayer for a receivership. Where there are two remedies at law it has never been pretended that one legal action can be dismissed because another legal action would give the plaintiff a remedy.

The same is true of equitable actions, and where there are two different ways of proceeding to secure a relief to which plaintiff is entitled he may pursue the remedy he

desires, and if he applies to the Court for a proper remedy, he cannot be turned away on the ground that there is open to him some other remedy which would procure for him the same result.

It is submitted, however, that there are several particulars in which the appointment of a receiver would give relief to which they are entitled, which cannot be obtained in any other way.

First.—If a receiver of the corporation were appointed he would be entitled to all the books, papers and documents of the Company and would be therefore better able to protect the corporate rights than a mere stockholder would when the hostile directors were in possession of the corporate papers and records.

Second.—There are certain actions and proceedings which could be brought by a receiver, but which could not be brought at all by the stockholders, at least as far as anyone is able to see. For instance, a receiver of the corporation could proceed to Mexico and take up again the proceedings commenced there by the Cobre Grande Copper Company to have restitution of the mines awarded to it, and could litigate before the courts of Mexico the right of possession of the Cobre Grande Copper Company. Whether or not a stockholder of the Company could go down to Mexico and do the same thing does not appear; a stockholder is entitled to be put in a position where litigation in support of the rights of the corporation can be carried on in the most effective way and with the least danger of defeat.

Third.—The minority stockholders are entitled to have the rights of the corporation protected and defended at the cost of the corporation, and not at their own cost. At present, all efforts to protect the rights of the Cobre Grande Company are being carried on by the minority stockholders at their own cost, and the expense of defeating these efforts is borne presumably, in part at least, by the treasury of the Cobre Grande Copper Company, which is controlled by Greene.

The suggestions in the opinion below that the receiver if appointed would be confronted with difficulties arising from lack of funds, &c., are, we submit, not sufficient to justify a dismissal of this complaint. The parties in interest may provide him with the necessary funds.

SEVENTH POINT.

CERTAIN OTHER ASSIGNED ERRORS APPEARING IN THE RECORD.

A. The first and second assignments of error relate to the exceptions taken to the admission in evidence of the collusive judgments, dismissing certain proceedings of the Cobre Grande Copper Company obtained in Arizona and Texas in April and May, 1901.

Objections to the Arizona Record.—The offer in the Arizona record is found on p. 74, and the ruling and exception taken by plaintiff to its admission is on p. 75.

This Arizona record has been heretofore discussed in this brief.

Objection to the Texas Record.—The Texas record is on pp. 121-136, and the exception to its admission is on p. 75 of this record. It sets forth an action in replevin to recover matte from third parties, who claim to be innocent holders thereof, judgment for the defendants, and an appeal which was dismissed May 15, 1901, *by consent*, after Greene had got control of the Cobre Grande Copper Company (*see Record*, p. 135). There is no finding as to this Texas record, so that it probably need not be further discussed than to say that being an action in replevin, to which the plaintiff was not a party, it could not in any view be considered an adjudication of his rights as a stockholder nor of the title of the Cobre Grande Copper Company to these mines.

It was part of the fraudulent agreement of December

12th that these two causes should be dismissed (*Record*, p. 106).

B. *The Fifth Assignment of Error.*—The witness Gage, former president of the Cobre Grande Copper Company, a party to the agreement of December 12, 1900, complained of, was asked by defendants this question:

> "Q. Referring to the agreement of December
> "12, 1900, will you state what the $25,000 and the
> "two amounts of $30,000 therein mentioned, mak-
> "ing $85,000, was for?"

This was objected to by plaintiffs' counsel and objection overuled, and plaintiffs excepted (*bottom* of p. 78 and *top* of p. 79). This ruling constitutes the fifth assignment of error (p. 206).

Upon this evidence Judge Sloan found in accordance with Gage's statement as to the *intention* of these payments (*see Finding IX*, p. 151). We submit that this was error.

C. *The Secret Trust to Gage.*—Whatever the intention might have been Gage received $85,000 in these three sums, without any contract or binding agreement on his part as to the disposition thereof. Defendants claim that there was a secret trust for the benefit of Hallenborg as creditor hidden in these payments. This agreement was the work of able counsel, among the most astute in the Territory of Arizona. What could have been the object of this $85,000 secret trust in Gage's hands? The Court finds (p. 151) that it was intended to pay the company's debts, including Hallenborg. It appears upon the trial of this case that Hallenborg has not been paid, and he has in fact never been paid to this day. Mr. Gage testified:

> "I did not make any effort to apply the $60,000
> "to the payment of the New York notes." (P. 81.)

If there was a secret trust, and it was intended to use

it as a club to compel Hallenborg to surrender his position, by refusing to pay his notes unless he did so, these parties should not be allowed to come in afterwards and escape the consequences of this illegal agreement by declaring innocent intentions. The legal or illegal effect was the same, whatever the intentions were.

The statement of a mere intention is not competent as evidence to justify an illegal transaction. It is to be noted that in addition to these sums Gage received 5,000 shares of stock equivalent to $50,000 "for his own use "and benefit," and the former counsel for the Company received 5,000 shares equivalent to $50,000 more, apparently to induce the assent of the President of the Company and the counsel who had represented it, to this fraudulent transaction (*see Record, copy of agreement, p. 106*).

Gage tried unsuccessfully on the trial to explain this $50,000 transaction in the following language:

> "I do not know of the application of any particu-
> "lar sum towards my salary out of this money
> "obtained under the agreement of December 12th.
> "I retained what I had. The contract was 5,000
> "shares of stock. They afterwards paid me
> "$50,000 in lieu of that. I do not know how much
> "of it was for salary. Might call it all salary or
> "expenses or anything else—salary and expenses.
> "I do not recollect how it was divided. There was
> "a salary of $15,000 a year voted me at one of the
> "meetings. I think that was November, 1900.
> "That was the first vote for salary attached to the
> "President's office." (*Record, bottom of p. 83.*)

There was therefore only a month's salary of $1,250 due Mr. Gage at the time when he got $50,000 for signing this fraudulent contract.

Of course the directors could not legally vote Gage any sum whatever for back salary.

> *Bennett* v. *St. Louis, etc., Co.*, 19 Mo. App., 349.

It is true that the Court finds this contract was entered into in good faith, with the knowledge and consent of the directors and upon the advice of counsel, that is to say, of the very counsel who got 5,000 shares of stock in the Greene Company; but no amount of good faith can justify such an immoral and reckless transaction as was consummated under this agreement.

EIGHTH POINT.

THE SUPREME COURT OF ARIZONA ERRED IN REFUSING TO CERTIFY A STATEMENT OF THE FACTS IN THE NATURE OF A SPECIAL VERDICT.

The Trial Court having failed to make full and complete findings, it became the duty of the Supreme Court of Arizona to examine into the record of this case and make and certify a statement of fact in the nature of a special verdict, which should include all material facts proven by uncontroverted testimony and especially those omitted or incorrectly stated by the lower court.

> *Organic Law of Arizona*, 1 Supp., R. S. U. S., p. 7; being Chap. 80; 43rd Cong., April 1, 1874.

A petition for such a statement of facts in the nature of a special verdict was presented by the plaintiffs' counsel to the Supreme Court of Arizona and is found in the record pp. 182-192. The request was refused by the learned Chief-Justice Kent (*see memo. p. 192*).

We have made this the ground of the 21st assignment of error (p. 211).

In this case a great many uncontroverted facts were omitted in the findings signed by the trial justice, notably those tending to establish collusion in the entry of the Maricopa County judgment.

In the plaintiffs' theory of the case it will not be necessary to look into any facts beyond those found by the trial

justice to require this Court to reverse the judgment appealed from, but should the Court desire to examine further into the facts in this case we insist that we have preserved our right to an examination thereof by the practice adopted for our protection.

NINTH POINT.

THE JUDGMENT SHOULD BE REVERSED.

The judgment appealed from is erroneous and should be reversed, and the cause remanded with instructions to enter a judgment appointing a receiver of the Cobre Grande Copper Company; enjoining the further carrying out of the agreement of December 12th, 1901; setting aside the judgment of April 15th, 1901, rendered in the Third District of Arizona in the suit of Cobre Grande Copper Company against Greene and others as fraudulent, permitting plaintiffs and the receiver to intervene in that suit for the protection of their respective rights and interests, directing the deeds taken from the Phœnix National Bank by the defendant Greene and others to be returned to the Bank; and directing and authorizing the receiver thus appointed to take such steps as may be necessary or proper to protect the rights of the Cobre Grande Copper Company in the premises.

Dated, Washington, October Term, 1905.

ALFRED B. CRUIKSHANK,
Of Counsel for Plaintiffs and Appellants.

IN THE

Supreme Court of the United States.

Office Supreme Court U. S.
FILED
NOV 24 1905
JAMES H. McKENNEY,
Clerk

No. 87.

AXEL W. HALLENBORG AND J. EDWARD ADDICKS,
Plaintiffs and Appellants,

against

COBRE GRANDE COPPER COMPANY, WILLIAM C. GREENE, CANANEA CONSOLIDATED COPPER COMPANY, impleaded with others,
Defendants and Appellees.

BRIEF FOR APPELLEES.

NORTON CHASE,
EUGENE S. IVES,
Of Counsel for Appellees.

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IN THE

Supreme Court of the United States.

AXEL W. HALLENBORG, *et al.*,
Appellants,

vs.

THE GREEN CONSOLIDATED COPPER COMPANY, WM. C. GREENE, impleaded with COBRE GRANDE COPPER COMPANY, *et al.*,
Appellees.

BRIEF OF APPELLEES.

The findings of the court are as follows:

That Hallenborg owned 8,000 shares of the stock of the Cobre Grande Copper Company at the time the suit was commenced and at the time it was tried; that Addicks owned 5,000 shares; that at said times said Hallenborg was the owner and holder of the promissory notes set out in the complaint; that since prior to January 1st, 1900, the Cobre Grande Copper Company had been engaged in a series of law suits with defendants Mitchell and Greene and their associates in Sonora, Mexico, and in the county of Maricopa, Arizona, and in El Paso, Texas, and in the State of New York. That the suit in Maricopa County was commenced on the 25th of November, 1899, and is known as No. 3437; that in said suit the Cobre Grande Company was plaintiff and defendants Greene, Mitchell, and the

Phoenix National Bank were defendants; that in said suit the Cobre Grande Copper Company alleged among other things in substance all the facts set forth in paragraph 3 of plaintiff's original complaint on file in this action, and prayed that Greene be required to account to the Cobre Grande Company for the proceeds of the products of said mines and mining claims mentioned in plaintiff's complaint together with the supplies, material and property of the Cobre Grande Company alleged to have been taken and appropriated by him. That issues were joined by defendants in said action; that the case was tried on the issues involved and finally submitted to the court for decision and judgment. That on April 15th, 1901, the court having fully considered the cause, the allegations and evidence, found the issues for defendants, and entered judgment dismissing plaintiff's complaint. That said judgment so rendered by said court has not been appealed from or taken up to any appellate court of Arizona by any writ of error or any other proceedings. That at the time said judgment and decree was made and entered in Maricopa County, and for a long time prior thereto, plaintiffs in this action were stockholders in the Cobre Grande Copper Company.

That the suit in the State of New York is still pending, and that all the other suits mentioned in plaintiff's complaint were dismissed or otherwise disposed of by final judgment prior to the commencement of this action.

The Court further found that about November, 1898, and prior thereto, defendant Greene owned certain property in Sonora, Mexico, and had options to purchase other properties there, being the same mentioned in plaintiff's complaint.

That in said November, Greene executed an option on the property owned by him in Sonora, and other property for which he had contracts, to defendant Mitchell; that said option provided that Mitchell should pay in cash upon the execution of the contract, $12,500.00, and the balance of $237,500.00 as follows: $37,500 to be paid on or before November 26th, 1899, $100,000.00 on or before November

26th, 1900, and $100,000.00 on or before November 26th, 1901.

That about April, 1899, Greene and Mitchell, with the assistance of other parties, organized the Cobre Grande Copper Company under the laws of Arizona. That 199,995 shares of the capital stock of said Company were delivered to Mitchell in consideration of his options from Greene, which option between Greene and Mitchell was assigned to the Cobre Grande Company subject to the rights of Greene therein. That the Cobre Grande Company then entered into the possession of said property and began to operate the same, and was in possession in September, 1899.

That about October, 1899, controversies arose between the Cobre Grande Company and Greene over said option and the right of possession to said mining property, and on or about that time Greene entered into possession of said property. Thereupon, the Cobre Grande Company brought the suit mentioned, in the courts of Sonora, Mexico, to regain possession of said property, and also instituted suit No. 3437 in Maricopa County to restrain the delivery to Greene of the deeds which were put in escrow under the contract with Mitchell, and thereafter assigned to the Cobre Grande Copper Company.

That in suit No. 3437, a temporary injunction was granted restraining the Phoenix National Bank as escrow agent of the parties, from delivering said escrow papers to Greene, and also restraining Greene from demanding or receiving them from said bank.

That while this litigation was in progress, a majority of the stockholders of the Cobre Grande Company, comprising stockholders to the extent of 115,049 shares, entered into a pooling agreement, whereby all of said shares were delivered to defendant Gage with power to vote the same at all meetings of the stockholders, and that after said stock was pooled and while the pooling contract was in force, said stockholders granted to defendant Gage, the holder of said stock in pool, the right to dispose of and sell the same at his discretion.

That on January 5th, 1900, Gage, as Trustee, entered

into an option contract with Orne for the sale of said stock at $2.50 per share. That on March 30th, 1900, Gage, as Trustee, entered into a like contract with L. H. Chalmers for the sale of 101,000 shares at the same price. That on June 2nd, 1901, he entered into a similar contract with Chalmers, as agent, for the sale of 101,000 shares upon the same terms and conditions, and that on the same day Chalmers made a written declaration that he was acting for W. H. Dowe, of New York, and his representatives; and on the same day Dowe declared in writing he was acting for defendant Costello and Hallenborg, plaintiff, in this action, and H. H. Adams, J. Shirley and Senator De Boe.

That under this last option said parties purchased 16,000 shares of the capital stock of the Cobre Grande Company and paid $2.50 per share for the same.

That said contract, like all the others, has been forfeited and lapsed for failure of the parties to comply therewith, among whom was the plaintiff Hallenborg.

That afterwards plaintiff Hallenborg and defendant Costello opened negotiations with Gage, and undertook to procure an option from him for the purchase of said stock held by him as trustee for $2.50 per share.

That plaintiff Hallenborg in this matter was represented by Grant R. Bennett, under a power of attorney from Hallenborg to represent him, and who personally opened negotiations in behalf of Hallenborg to procure said option for the purchase of said stock held by said Gage. That defendant Costello was present at this time, which occurred about October, 1900.

That various other contracts were drawn up and submitted for the consideration of the parties trying to effect a deal, and that the form of the contracts which were drawn, was agreeable to and in conformity with the views and agreement expressed by Hallenborg through his attorney, Bennett, and was consented to by Hallenborg and his attorney, Bennett; but objections were raised by Costello, and that Hallenborg being unable to or not desiring to enter into said contract alone, and without Costello, the same was not for that reason signed.

Various other contracts were suggested with like tenor and import, all of which were consented to by the said Hallenborg and the Cobre Grande Company, but were not satisfactory to Costello, and were not signed for that reason.

That these negotiations were kept up between Hallenborg and Costello on the one part, and Gage as Trustee, on the other, until about the first week in December, 1900, and nothing resulted therefrom.

That thereupon Gage opened negotiations with Greene to sell him the stock, and that Greene offered to purchase the same *upon better terms than any one else had offered.* That Gage consulted the Directors and a large majority of the stockholders of the Cobre Grande Company, and they urged him to enter into a contract with Greene for the sale of said stock; that said stock represented by said Gage comprised the entire stock of the Cobre Grande Copper Company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties; and thereafter, on the 12th of December, 1900, he entered into the contract of that date, mentioned in plaintiff's complaint.

That after said contract was made, a meeting of the Board of Directors and a meeting of the stockholders of the Cobre Grande Company was held, and said contract was ratified in its entirety by said Directors and by a majority vote of the stockholders at said meetings. Said Hallenborg being present at the stockholders' meeting, protesting against the ratification of said contract.

That said Greene complied in all respects with said contract of December 12th, 1900, and paid for said stock in full, according to the contract price.

That said stockholders accepted the money so paid to Gage by Greene, and ratified said contract, except plaintiff Hallenborg, who declined to be bound thereby.

That said contract of December 12th, 1900, was entered into by Gage in good faith with the full knowledge and consent of the Directors of the Cobre Grande Copper Company, *and upon the advise of counsel of the Cobre Grande Copper Company that the Company could not suc-*

cessfully maintain its suit, No. 3437, and with the belief on his part that said contract was to the best interest of said Company and its stockholders.

That no agreement was made between Gage or any other persons whereby any of the directors were to derive, or did derive any benefit or gain whatsoever, except such benefits as they derived from the sale of their stock.

The Court further found that the $25,000 mentioned in the contract of December 12th, 1900, was for the purpose of discharging certain outstanding notes due and owing by the Cobre Grande Copper Company to its creditors, and was paid by Greene and used in paying said creditors.

That the $30,000 cash, mentioned in said contract, was for the purpose and it was intended by the parties to be turned into the treasury of the Cobre Grande Company to pay its debts, and was paid into the treasury of the Cobre Grande Company.

That the 3,000 shares of the capital stock of the Greene Consolidated Copper Company, mentioned in the contract, or the $30,000 which Greene had a right to pay in lieu thereof, together with the $30,000 last above mentioned, was intended by the parties to be paid into the treasury of the Cobre Grande Copper Company for the purpose of paying its indebtedness outside of the $25.000 in Finding 9 last above mentioned, a portion of which indebtedness said Hallenborg claims in this action, and that the same was paid in cash by Greene to Gage, and by him into the treasury of the Cobre Grande Copper Company.

That the 5,000 shares of the capital stock of the Greene Consolidated Copper Company mentioned in said contract agreed to be paid to said Gage, was intended by all the parties as compensation to Gage for services rendered by him as President of the Cobre Grande Company, and as compensation for his time, labor, trouble and attention given to the Company's business, and for money advanced to and for said Company, and for expenses paid in attending to the affairs of said Company, and in connection therewith, and was paid in cash, to wit: the sum of $50,000.00.

That the 5,000 shares of the stock of the Greene Consolidated Copper Company mentioned in said contract as

agreed to be paid to Chalmers, Baker and Bennett and Herndon & Norris, attorneys for the Cobre Grande Copper Company, was intended to be paid for services rendered to said Company in various litigations, and that $50,000 was paid in cash in lieu thereof, and was distributed among said attorneys, and that their services were reasonably worth said amount, and there was no evidence to the contrary.

That the note of Costello mentioned in the contract of December 12th, 1900, was conditioned upon the Cobre Grande Copper Company obtaining possession of said property in Mexico. Said note was not to be paid until ninety days after recovery of possession. The note was turned over to Costello under the terms of said contract.

The Court further found that the only property now in possession of the Cobre Grande Copper Company within the jurisdiction of the court, is the money held by the Treasurer of said Company, which was paid to him as part of the proceeds of the agreement of December 12th, 1900.

Finding XI is: That the temporary restraining order granted in this action, enjoining defendants from carrying out the terms and provisions of the contract of December 12th, 1900, and dismissing all of the actions then pending in behalf of the Cobre Grande Company, and enjoining the Phoenix National Bank from delivering any of the papers and documents held by it in escrow evidencing title held by the Cobre Grande Company to the mining property described in plaintiff's complaint, was modified, and that that part of it enjoining the Phoenix National Bank was dissolved upon the ground that the District Court of Maricopa County had rendered its decision in the suit of the Cobre Grande Company against Greene and others adversely to said Cobre Grande Copper Company, and that as part of the judgment of said Court the Phoenix National Bank was commanded to deliver up said papers and documents to said defendant Greene, and that as this case now stands, there is nothing before the court except an application for the appointment of a Receiver.

As conclusions of law from the facts as above stated, the

court decided that plaintiff was not entitled to any relief whatsoever; that the application for the appointment of a Receiver should be denied and the plaintiff's complaint be dismissed; that defendants recover their costs, and the court ordered judgment and decree accordingly.

The above contains a statement of all the facts found by the court, and they are all supported by competent testimony free from objection. Indeed no attack is made on them, and this court will not review them.

The prayer of plaintiff's complaint is, that plaintiff have judgment; that the Cobre Grande Company and the defendants, its directors, officers, etc., be enjoined from discontinuing, or causing to be discontinued, or dismissed the actions pending in New York, Texas, in Maricopa County, and in Sonora in the Republic of Mexico, and that a mandatory injunction issue out of the court directing the Cobre Grande Company, and the defendant, its officers, directors, etc., to prosecute and pursue in its behalf, all actions brought by any of the defendants herein for the recovery of said property, or any property rights of the Cobre Grande Company; that plaintiff be brought in and made party plaintiff to said actions as far as it may be necessary to protect his rights, and it be ordered that he have the right to intervene in the suits pending in Arizona, New York, Texas or elsewhere. That the defendants Gage, Adamson, Costello and O'Keefe be removed as directors, president and secretary; that a receiver be appointed to take possession of the property of the Cobre Grande Company, and to protect same, and to prosecute the aforesaid suits, claims, etc., against Greene, Mitchell, their confederates and agents, and the remaining defendant corporations herein, and to defend the Cobre Grande Company from the conspiracies of said defendants, and to operate said mines, and that defendants Greene and Mitchell be restrained from receiving from the Phoenix National Bank the papers constituting and evidencing the title to said property; that the Phoenix National Bank be restrained from delivering said papers to Greene and Mitchell, or to any other person except the Cobre Grande

Company, or said receiver. That the time for the payment of the installment of $37,500, and all other installments under said contract for the purpose of said properties of the Cobre Grande Company be extended to a reasonable time after it shall be restored to the possession of said mines. That defendants Greene, Mitchell, Cananea Consolidated Copper Company, and the Greene Consolidated Copper Company be required to account to the Cobre Grande Copper Company for said property, including the products of the mines, supplies, materials, etc., and be required to pay any amount found due on such accounting, and for such other and further relief as may be just, etc.

It will be seen by the findings above stated, that all of the suits except the New York suit, had been dismissed or disposed of by final judgment before this action was commenced, and that that suit is being prosecuted to-day by Mr. Hallenborg, the plaintiff in this case, and without the intervention of a receiver.

That all of the defendants who were officers or directors of the Cobre Grande Copper Company, and whom plaintiff prays may be compelled to prosecute the said actions, had ceased to be officers, directors or agents at the time the action was commenced.

That the Phoenix National Bank had delivered the papers and documents constituting and evidencing the title to the property in controversy, to Greene or the Greene Consolidated Copper Company before this action was commenced under the command of the District Court of Maricopa County, No. 3437, and there was no attempt towards an accounting.

It is apparent therefore, that the court could not comply with the prayer of plaintiff's complaint as to these matters, and that there was really nothing before the court except an application for the appointment of a Receiver as the court found.

ARGUMENT.

The appellees submit the following propositions:

I.

In no event can the Cobre Grande Copper Company have a cause of action against W. C. Greene, the Greene Consolidated Copper Company or the Cananea Consolidated Copper Company, and for this reason the judgment should be affirmed.

II.

Under the pleadings and evidence, irrespective of the judgment in Texas and of the District Court of Maricopa County the agreement of December 12th should be declared valid.

III.

The judgment of the District Court of Maricopa County is a bar to any action which a receiver, if appointed, might bring, and for this reason the judgment should be affirmed.

IV.

The judgment of the Texas court is a bar to any action which a receiver, if appointed, might bring, and for this reason the judgment should be affirmed.

V.

The court has no power to appoint a receiver for the sole purpose of instituting litigation.

VI.

Even if the court had such power the plaintiffs have their remedy as minority stockholders, and the exercise

of such power is discretionary; and the judgment of the lower court declining to exercise such discretion is not subject to reversal.

POINTS.

I.

The District Court and Supreme Court of Arizona have both found that there was no actual fraud. That Gage in signing the agreement of December 12th acted in good faith, and as advised by his attorneys, to the best interests of the Cobre Grande Copper Company.

It is to be presumed that Greene and the Greene Consolidated Copper Company knew that Gage was acting in good faith, and therefore, whatever redress the minority stockholders of the Cobre Grande Copper Company may have against Gage, they have none against Greene or the Greene Consolidated Copper Company, who, dealing at arm's length with Gage and those representing a majority of the stock of the Cobre Grande Copper Company, and their being no actual fraud, had the right to consider the contract made as valid and binding upon their adversaries in the negotiations leading up to it, and to enjoy the benefits of the same, if any.

As a matter of course, therefore, it seems that the Cobre Grande Copper Company and all of its stockholders have no redress against Greene and those whom he represented. The judgment, therefore, should be certainly affirmed as to Greene and those whom he represented, and inasmuch as it appears that the sole purpose for which a receiver is asked is to prosecute a claim against the Greene interests, the entire judgment should be affirmed, even if it should be held that such judgment would be without prejudice to the plaintiffs to prosecute in the name of the Cobre Grande Copper Company any claims which they may undertake to establish against Gage and the defendants associated with him.

II.

CONSIDERATIONS REGARDING THE CONTRACT OF DECEMBER 12, 1900.

Before proceeding to a discussion as to whether the court had the power to appoint a receiver or whether in the event that it had, it abused its discretion in not doing so, it is suggested that under the allegations of the complaint and the facts as found by the District Court and the Supreme Court of Arizona, the action of the directors of the Cobre Grande Copper Company ratifying the agreement of December 12th cannot be set aside.

The court has found that there was no fraud in the execution of the contract of December 12th. (Finding VIII, p. 151.)

It has also found (Finding 9, pp. 151-152) that as direct consideration for the contract of December 12th, $185,000 was paid by the Greene interests to the Cobre Grande Copper Company if the $50,000 paid for services to Gage be deemed a payment to said company; and that in any event the remaining $135,000 was paid by the Greene interests to the said company as such consideration.

Even if there were constructive fraud, the action of the directors of the Cobre Grande Company constituted under the pleadings and evidence the valid act of that company.

In order that the action of the directors of the company be avoided, it is not sufficient that fraud be shown. It must also be established that the action of the directors was injurious to the interests of the company; that it was a wanton destruction of its rights.

Whatever may have been the form of the proceedings which took place between Greene and the Greene Consolidated Copper Company and Gage and the other directors of the Cobre Grande Company on or about the 12th of December, 1900, the obvious intent of the parties was to compromise the litigation which was pending.

There is no proof, or attempt to prove on the part of the plaintiff in this case that the Cobre Grande Company

had any undisputed rights other than the rights to litigate.

The suit which had been tried in the district court of Maricopa county, and whose decision was then under advisement by Judge Street, had been prosecuted with vigor. Success in such suit by the Cobre Grande Company meant appeals in American Courts and a long and dubious litigation in the Republic of Mexico. Defeat in such suit rendered such company hopelessly insolvent, and the claims of its creditors and the shares of its stockholders would have become valueless.

It cannot be claimed, as a matter of course, and without evidence, that the compromise made on December 12, 1900, was not to the advantage of the Cobre Grande Copper Company.

Let it be assumed that such compromise was not as yet effective, but that the negotiations tending thereto had been virtually concluded, and that the papers consummating it were in course of preparation, and that this suit instead of being an action to declare such compromise agreement void, was an action to enjoin its execution.

Can it be seriously contended that any court at the instance of a minority stockholder would order the issuance of a writ of injunction restraining such compromise, and thereby imperil and hazard the rights of a vast majority of the stockholders?

The issuance of such injunction would prevent the execution of the contemplated agreement. The Judge of District Court of Maricopa County would hand down his decision, and if adverse to the Cobre Grande Copper Company, a vast majority of its stockholders could with propriety impute to the action of the court the total loss of the property which they had ventured in the enterprise.

Certainly no such injunction could have been granted except upon strong proof that the compromise was manifestly to the disadvantage of the Cobre Grande Copper Company.

It is, therefore, respectfully insisted that in the absence of any proof to this effect, and in the face of the finding

of the court to the contrary, it is not proper that this agreement should be set aside.

Upon proper evidence it is for the court to decide whether the contract alleged to be fraudulent is a fair one or not, with power to set it aside if it is manifestly unfair.

2 *Cook on Corporations,* Sec. 649, p. 1459, 5th Ed.

"And even though the boards of directors of two corporations are the same, and one buys out the property of the other, yet the transaction is not void, and will not be set aside at the instance of a stockholder unless he shows damage."

2 *Cook on Corp.,* Sec. 658, 5th Ed., p. 1512.
Smith v. *Ferries,* 51, p. 710.

"If the minority stockholders object to the contract the Court will consider it and will sustain it if fair and set it aside if unfair."

Lyman v. *Kansas City R. R.,* 101 F., 636.

"In the absence of fraud *and unfairness* the minority may not defeat the whole body of associates respecting the security common to all."

Shaw v. *R. R. Co.,* 100 U. S., 605.

"It is well settled that a director may deal with his corporation. He may advance it money by way of loan or sell it property. Such contracts are voidable at the instance of the beneficiary, but are not void, and in order to avoid them, injury must be shown."

Copsey v. *Sacramento Bank,* 66, p. 7.

The authorities are conclusive that even when a director makes a contract with a corporation, if such contract be

approved by the stockholders, it is valid as against the dissent of a minority of the stockholders.

2 *Cook on Corp.*, Sec. 649, 5th Ed., p. 1458.

> "The action of the stockholders validates the contract even where nine out of thirteen directors were personally interested."
>
> *Leavenworth* v. *Chicago R. R. Co.*, 134 U. S., 688;
> *Nye* v. *Storer*, 168 Mass., 53.

In *Bill* against *Western Union Telegraph Company*, 16 Fed., page 14, the court, at page 19, holds as follows:

> "If it should be assumed that a majority of the stockholders of the lessor have adopted, or are willing to adopt the act of the directors, notwithstanding they were also directors of the lessee, the complainant is without remedy and without equities, as by permission of the statute such lease is within the legitimate discretion of the corporation. It would not be equitable or just that a single stockholder, or a majority of the stockholders, should be permitted to defeat the wishes and thwart the interests of the majority. It is an implied condition of the association of stockholders in a corporation that the majority shall have authority to bind the whole body in any transaction within the corporate powers."

It is also found in the eighth finding of fact that the contract of December 12th "was entered into by Gage in good faith, with the full knowledge and consent of the directors of the Cobre Grande Copper Company, *and upon the advice of counsel of the Cobre Grande Copper Company that the company could not successfully maintain this suit.*"

Even if it be admitted that the finding that a director acted in good faith is a conclusion of law, as argued by the counsel for the appellant, it cannot be contended that the finding that Gage had been advised by his counsel that the

Cobre Grande Copper Company could not successfully maintain its suit, is other than a most material finding of fact.

If the directors of the Cobre Grande Copper Company believed honestly and fairly upon advice of counsel that the Cobre Grande Copper Company would be defeated in its litigation, it was not only clearly within their right, but it was their absolute duty to effect the compromise which they did.

In *Gamble* v. *Queens County Water Co.*, 123 N. Y., 91, a contract was made with one Mullins, Secretary and Treasurer and Director of the Queens County Water Co., by which the corporation agreed to pay him $110,000 in new stock and bonds, in payment of property belonging to him, which the Trial Court found to be of the value of less than $61,000. A meeting of the stockholders was held, at which 497 shares out of a total of 500 were represented, and 467 shares were voted upon in favor of the adoption of the resolution, while 30 of the plaintiff's shares were voted upon by him in opposition thereto, and 3 shares were not voted upon.

The court says:

> "There were a majority of shareholders and a majority of shares voted upon in favor of such resolution without counting the defendant Mullins or his shares, although he voted upon them in favor of such resolution. In so doing he committed no legal wrong. *A shareholder has a legal right, at a meeting of the shareholders, to vote upon a measure, even though he has a personal interest therein separate from other shareholders. In such a meeting each shareholder represents himself and his own interests solely, and he in no sense acts as a trustee or representative of others. The law of self-interest has at such time very great and proper sway. There can be little doubt, too, that at such meetings those who do vote upon their own stock vote upon it in the light solely of their own interest,* or, at least, in what they

conceive to be their own interest. *Their action resulting from such votes must not be so detrimental to the interests of the corporation itself, as to lead to the necessary inference* that the interests of the majority of the shareholders lie wholly outside of and in opposition to the interests of the corporation and of the minority of the shareholders, and that *their action is a wanton or fraudulent destruction of the rights of such minority.* In such cases it may be stated that the action of the majority of the shareholders may be subjected to the scrutiny of a court of equity at the suit of the minority shareholders. These views are exemplified in the comparatively recent English case of *N. W. T. Co. v. Beatty,* (L. R. (12 App. Cas.) 589), where one of the directors in a company contracted with his colleagues to sell to the Company a vessel which he owned for a price named. The contract was in fact a fair one, but it was admitted to be voidable, and it was held that the vendor director had a right at a meeting of the shareholders to vote in favor of ratifying such contract and concluding such purchase, and that his conduct was not to be regarded as oppressive towards the minority of shareholders because he individually owned a majority of the stock. It was said that a resolution of a majority of the shareholders upon any question with which the company was competent to deal, was valid and binding upon the minority. *A voidable contract, it was also said, might be ratified or affirmed by a majority of shareholders at a proper meeting, provided that such ratification was not brought about by improper means, and the contract itself was not fraudulent or oppressive towards the minority. Baggallay, L. J.,* said that great confusion would be introduced into the affairs of joint stock companies if the circumstances of shareholders voting in that character in general meeting were to be examined and their votes practically nullified if they also stood in some fiduciary relation to the company.

"I think that where the action of the minority is plainly a fraud upon, or, in other words, is really oppressive to the minority shareholders, and the directors or trustees have acted with and formed part of the majority, an action may be sustained by one of the minority shareholders suing in his own behalf and in that of all others coming in, etc., to enjoin the action contemplated, and in which action the corporation should be made a party defendant. It is not, however, every question of mere administration or of policy in which there is a difference of opinion among the shareholders that enables the minority to claim that the action of the majority is oppressive, and which justifies the minority in coming to a court of equity to obtain relief. *Generally, the rule must be that in such cases the will of the majority shall govern. The court would not be justified in interfering even in doubtful cases, where the action of the majority might be susceptible of different constructions. To warrant the interposition of the court in favor of the minority shareholders in a corporation or joint stock association, as against the contemplated action of the majority, where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company and in a manner inconsistent with its interests. Otherwise the court might be called upon to balance probabilities of profitable results to arise from the carrying out of the one or the other of different plans proposed by or on behalf of different shareholders in a corporation, and to decree the adoption of that line of policy which seemed to it to promise the best results, or at least,*

to enjoin the carryiny out of the opposite policy. This is no business for any court to follow."

The Cobre Grande Copper Company had an asset which was a chose in action. A receiver is asked in this case for the sole purpose of determining the value of such asset by prosecuting such chose in action. That the directors and stockholders of the company had the right to settle the litigation cannot be disputed, and any settlement made by them for a consideration would be binding upon the company unless such consideration were grossly inadequate to the value of the chose of action. The plaintiffs have submitted no evidence whatsoever with respect to the value of this chose in action.

The value of a chose in action depends upon two elements, both of which are essential to its having any value whatsoever.

(1) The probability of success in the litigation;

(2) The value of a judgment if obtained.

It is respectfully submitted that there is no evidence whatsoever as to the probability of success in the litigation. The plaintiff proved that there had been litigation. But in declining to offer evidence as to the merits of such litigation, he leaves his case entirely barren of proof as to the chances of success. It is therefore under the evidence impossible for the court to find that a settlement for $135,000 was not a most advantageous one for the company.

These stockholders represented by Gage had given three successive options upon their stock at the price of $2.50 per share, and, at the same time that the agreement of December 12th was executed, Gage was endeavoring earnestly in their behalf to procure Hallenborg and Costello to take an option upon their stock at $2.50 per share. Therefore, the owners of 107,000 shares of stock had nothing to gain by the most successful litigation, except $2.50 for each share of stock. Of course, no creditor could hope under

the most felicitous circumstances to obtain more than the full amount of the debt due him. On the other hand, if no settlement had been made and the litigation had been decided adversely to the Cobre Grande Company, the creditors and stockholders would have lost their all. At this juncture Greene offers while the litigation is still in doubt to give to all the creditors, and to all the stockholders everything which victory could secure to them. The offer of Greene assured to every creditor and every stockholder of the company, except Hallenborg, everything that such creditors and stockholders might, after victory hope or desire to get, and it assured to Hallenborg for his stock a sum of money per share which he had himself fixed as a fair value therefor after a successful issue of the litigation.

It is respectfully submitted that had Gage refused the offer of Greene simply in order that one stockholder might indulge his appetite for speculation, such refusal on his part would have been a gross abuse of his trust.

III.

It might be argued that in view of the fact that the stock of Addicks was not included in the terms of sale under the agreement of December 12th, his rights as plaintiff are upon a different and stronger ground than those of Hallenborg. In answer to such contention, it is submitted in the first place that it is the testimony of Gage that Greene agreed to buy the stock of any of the minority stockholders at the same price; and in the second place, that as a matter of fact Greene (p. 87, fol. 131) did offer Addicks $3 per share for his stock, which offer Addicks refused.

But it may be claimed that the mere fact that the agreement of December 12th did not provide for the purchase of the shares of the minority, and did provide for the purchase of the shares of the majority was a fraud upon the minority—that the surrender of the Cobre Grande Company's rights, without provision for the minority similar to that

made for the majority, is in itself a fraud, at least constructively; that the minority are entitled to better protection against the results of such fraudulent agreement than is afforded by the mere willingness of Greene to place them on even terms with the majority—that they are entitled to have their rights secured by decree of court; and, as collateral to this, it may be said that since Greene is chargeable with notice of the constructive fraud described, the rights of the Cobre Grande Company surrendered to him were taken subject to the equity of the minority shareholders, and that therefore, the minority are entitled to have the agreement annulled, and to have the rights surrendered restored to the Cobre Grande Company.

If, however, it is true, as we fully believe and assert, that the agreement of December 12th was a perfectly fair one—all this merely amounts to saying that the minority shareholders have a right to receive $2.50 per share for their stock, and that they are entitled to have this right secured to them by decree of court; for, if the agreement of December 12th was rescinded and declared void, and the rights of the Cobre Grande Company restored to it, the effect of such action would be to place the Cobre Grande Company in possession of a chose in action which it, or Hallenborg on its behalf, would be entitled to assert by means of litigation—the results of which, to say the least, would be doubtful. This litigation the directors of the Company would be entitled to compromise and settle upon any fair and honest terms, and no protest or objection upon the part of minority shareholders would avail to prevent this.

Cook on Corporations, Sec. 750.
Donohue v. *Mariposa Land? Etc. Co.,* 66 Cal., 317.
Chambers v. *Chambers & McKee Glass Co., et al.,* 39 Atl. Rep., 822.

And particularly must this be true when the directors are supported in such action by a large majority of all the stock in the company.

It should be remarked, in passing, that there is a broad and entirely evident distinction between the disposition of all the property of an active company and the settlement of a law suit prosecuted by a company which has no other enterprise and no other assets, but which had not been organized to prosecute such law suit. In one case, the very enterprise that the stockholders have agreed among themselves to carry on is terminated by the board of directors, whose power is in its very nature limited to the carrying on of the enterprise; while, in the other case, the litigation of the controversy is not the object of the company's organization, the shareholders have not agreed to embark in the prosecution thereof as the business of their association, and the power of the directors is therefore not limited by the interests of the situation and the management of such prosecution. Moreover, if any such doctrine as is applied to the sale of all the property and assets of a going company were applied to the compromise and settlement of litigation, the result might easily, and might not improbably, be that a small minority of recalcitrant shareholders might deprive the great majority of all possibility of realizing anything whatever upon their shares. Certainly the law does not contemplate and will not sanction such an absurdity.

What, then, would be the situation? The directors of the Cobre Grande Company would be entitled, immediately upon the entry of a decree rescinding the agreement of December 12th, to enter into another agreement, upon exactly the same terms, save that it would provide for the purchase of the shares held by the minority interest in the Cobre Grande Company at $2.50 a share; and, since this agreement would have avoided the only objection that is expressly urged to the agreement of December 12th, it would be unimpeachable. Equity will not pursue any such circuitous route in attaining its ends. If the fact be that minority shareholders have not been provided for by the agreement of December 12th, and that they are entitled to have their interests conserved by a decree of Court —although the agreement of December 12th is otherwise a perfectly fair agreement—a Court of Equity may and

should give them a lien subject to the rights of creditors, upon the assets of the Cobre Grande Company, and in case those assets shall not prove sufficient to discharge such lien, will decree that Greene and his associates shall take and pay for the shares at the rate of $2.50 per share, under penalty of a rescission of the agreement of December 12th in case they fail to make such purchase and payment. The case of *Ervin* v. *Oregon Ry. & Nav. Co.*, 27 Fed., 625, which is one of the cases principally relied upon by Hallenborg, is ample precedent for such a decree.

In that case the directors had made a sale of the property of a corporation to another corporation which was the holder of a majority of the shares of the first. The transaction had been fully consummated. The court found that it was within the power of the directors to make sale of all the property of the company when such sale had been sanctioned by a majority of the shareholders; that the minority could have no right to prevent the same being fairly made. In this case, however, the interests of the minority had not been properly provided for. The court held that the sale must stand, but that it would ascertain the value of the interests of the minority shareholders and give to those shareholders a lien therefor upon the assets of the old company in the hands of the new.

There is one clause in this contract which shows the perfect fairness with which Mr. Gage and Mr. Greene were dealing. Under his power of attorney Mr. Gage had the right of absolute disposal, and if Mr. Gage had made an absolute sale, Hallenborg could not have been heard to call it into question, as Greene's purchase would have been absolute and undisputed. But it was placed in the contract to avoid any possible controversy, that if any of the stockholders did not desire to sell, that Mr. Gage could withhold from delivery to Mr. Greene so much of the stock as the owners preferred to retain, provided Gage delivered to Greene 51 per cent. of the same. This was written specially by Mr. Gage for himself and his own protection, and when he sent the check for $4,000.00 to Hallenborg, he stated in his letter containing same that if Mr. Hallenborg did not

wish to sell for $2.50 he could return the check and he would return the stock to him. Mr. Hallenborg accepted that clause of his contract, returned the check and accepted the stock; he received the stock, therefore, under the terms of the contract, from his attorney in fact, acting for him. Mr. Gage would have had the right to have withheld it if by delivery he would have been unable to deliver to Greene 51 per cent. of the stock. Hence Hallenborg received this stock under and by virtue of the contract, and in consideration thereof. It was the only way he could get the stock away from Mr. Gage, where he had placed it. The consideration was good and valuable, and in receiving this stock under this contract, he ratified and consented to, as a matter of law, all the terms of this contract, and is bound by and estopped by it. Mr. Greene made his contract as an entirety, and he is entitled to enforce the whole contract, and to receive this stock under such circumstances is a ratification of the whole contract, and he (Hallenborg) cannot be heard to dispute it.

IV.

The Maricopa Judgment.

The judgment entered in Suit No. 3437 in the District Court of Maricopa County is not void and cannot be collaterally attacked.

The Court had jurisdiction of the parties and of the subject matter, and its judgment stands until reversed on appeal or until a new trial is granted. "A judgment is a vested right in the parties by whom it is recovered. If it is sought to review, correct, cancel or annul it, it must be done either *in the Court in which it is pronounced, or in the appellate tribunal.*"

> *York* v. *Cartwright,* 42 Texas, 141-2;
> *Voorhees* v. *Bank of U. S.,* 10 Pet., 449;
> *Thompson* v. *Tolmie,* 2 Pet., 157;
> *Hall* v. *Law,* 102 U. S., 461.

The rule is, that while judgments of inferior Courts must show jurisdiction, jurisdiction will generally be presumed in the case of Superior Courts; but, if want of jurisdiction appears on the face of the record of the judgment of a Superior Court, the judgment is void. Where there is jurisdiction in the Court to act, its judgment, until reversed or attacked by some direct proceeding to annul it, is valid and cannot be collaterally attacked.

Forbes v. *Hyde*, 31 Cal., 347-8-9;
Galpin v. *Page*, 18 Wall., 350;
Voorhees v. *Bank of U. S.*, 10 Pet., 449;
Lamp Chimney Co. v. *Brass & C. Co.*, 91 U. S., 659-661;
Hall v. *Law*, 102 U. S., 461-464;
Mattingly v. *Nye*, 8 Wall., 370;
Comstock v. *Crawford*, 3 Wall., 396.

The important question then is, does want of jurisdiction appear on the face of the judgment rendered in the District Court of Maricopa County? To ask the question is to answer it.

Under the rule laid down in *White* v. *Crowe*, 110 U. S., 187, and other cases cited, plaintiffs would not be entitled to relief even in an action directly assailing the judgment, for the reason that they could not aver and prove that they had a good cause of action on the merits, it being apparent from the record that they rely upon an option for the purchase of the Sonora mines which they have not complied with, or offered to comply with, and it is now too late. *Hansbrough* v. *Peck*, *supra;* and the allegations of plaintiff's complaint, if Judge Sloan's Court had jurisdiction, are wholly insufficient to entitle them to any relief in any Court under every rule of practice known to Courts of Chancery. The matters required to be shown in suits to set aside judgments are fully set forth in *Whitney* v. *Kelley*, 94 Cal., at pp. 153 *et seq.*, and it is sufficient to say here, that plaintiff's complaint does not meet the requirements.

In *Avegno* v. *Schmidt*, 113 U. S., 301-2, the Supreme

Court say: "The decree of a court of competent jurisdiction cannot be collaterally attacked by averring and proving that there was a good defense to the suit if the defendant had chosen to make it."

The contention on the part of plaintiffs that they are not bound by the decision of the District Court of Maricopa County is untenable.

In *Hawkins* v. *Glenn*, 131 U. S., 329, the Court say: "A stockholder is so far an integral part of the corporation that, in view of the law, he is a privy to the proceedings touching the body of which he is a member," then quotes from *Sanger* v. *Upton*, 91 U. S., 56, 58, as follows:

"It is not necessary that the stockholders should be before the Court when the order was made, any more than they should have been there when the decree of bankruptcy was pronounced.

"The plaintiff in error could not in this action question the validity of the decree, and for the same reasons she could not draw into question the validity of the order. She could not be heard to question either except by a separate and direct proceeding had for that purpose."

The remedy of plaintiffs, if any they have, is to sue in Maricopa County directly, to vacate the judgment in No. 3437. This Court cannot retry that case in this one; otherwise one Court of concurrent jurisdiction would review the judgments of another, and litigation would never end.

V.

The El Paso Judgment.

The judgment in the suit in El Paso, Texas, rendered , 1900, is also *res adjudicata* of the substantial issues in this case, so far as the defendants, Greene, Mitchell and the Cananea Consolidated Company are concerned. The Greene Consolidated Copper Company and the Phoenix National Bank, of Phoenix, were not parties to that suit, but, of course, if that suit is *res adjudicata*

as to Greene and the Cananea Consolidated Copper Company, that disposes of this suit, because, if, as between the Cobre Grande Copper Company and the Cananea Consolidated Copper Company, it is held that the Cobre Grande Copper Company has no right to the property in question as against the Cananea Copper Company, there can be no cause of action against the Greene Consolidated Copper Company, which simply owns stock of the Cananea Consolidated Company, or against the Phoenix National Bank.

In the complaint in the present action, it is said:

> "The defendant, the Greene Consolidated Cop-
> "per Company, after having by the means aforesaid
> "got into possession of the said mines, proceeded
> "to extract ore therefrom and to turn it into cop-
> "per matte and ship said matte to various
> "points and places in the United States, and there-
> "upon the Cobre Copper Company, *claiming under*
> *"the agreement made between Greene and Mitchell*
> *"and assigned to and owned by it to be the owner*
> *"of the ore in said mines,* in or about the months of
> "January, 1900, and August, 1900, brought actions
> "of replevin, or in the nature of replevin, to recover
> "possession of the matte so shipped, which actions
> "were brought at the City of New York, in the
> "State of New York, and at El Paso, in the State
> "of Texas, and thereupon the Greene Consolidated
> "Copper Company, or some of its agents, attorneys
> "or confederates put in an adverse claim or demand
> "to the same, and the litigation in regard to the
> "said matte (commonly known as the 'Matte Suits')
> "is still pending and undetermined."

And, again:

> "Each and every of said litigations * * * were
> "a part of the dispute and controversy aforesaid
> "originating out of and connected with the claim of
> "said Greene and his agents, including the Can-

"anea Consolidated Copper Company and the Greene
"Consolidated Copper Company to get control and
"possession of all the property of the Cobre Grande
"Copper Company, and especially of the mining prop-
"erties aforesaid, and each and every one of said
"actions and proceedings which were begun and com-
"menced by the Cobre Grande Copper Company or
"on its behalf, was meritorious and well-founded
"in law and in equity, and all were necessary steps
"and proceedings to defeat the fraudulent schemes
"and designs of said Greene and his confederates, as-
"sociates and agents as aforesaid, and to save and
"protect the property and existence of the said Cobre
"Grande Copper Company."

It is contended by the plaintiff that the judgment in the El Paso suit went off on a technicality, or for some reason or other, being a judgment in a replevin suit, it is not *res adjudicata* as to the issues in this suit.

Of course, there is no such doctrine as that no judgment in a replevin suit can be *res adjudicata* in an equity suit. The sole question is, were the issues in the replevin suit the same as those in the equity suit? An inspection of the pleadings in the El Paso suit and of the testimony that was put in, shows that the most important issues in the present case were disposed of in the El Paso suit.

The claim is made in this suit that the Cobre Grande Company had, and still has, the right to the possession of certain mines; that at the time the deeds were deposited in escrow, Mitchell was put into possession under an agreement which, read in connection with the escrow agreements, meant that he was to be allowed to retain possession for the purpose of making enough to pay the installments due under the contract with Greene, and that the Cobre Grande Company, as Mitchell's successor, had the same right of possession that was given to Mitchell, and that because the Cobre Grande was ejected in October, it was excused from making payment November 26th, of $37,500, and should be excused from making such payment until a reasonable time

after the Cobre Grande Company is again put in possession. The basis of this claim in the present suit is that the agreement under which Mitchell went into possession constituted an agreement by which he was entitled to remain in possession until, while so remaining in possession, he failed to make a payment of an installment due.

This same claim was the basis of the El Paso suit. Most of the allegations in the El Paso suit, relating to the history of the contracts between Mitchell and Greene, the organization of the Cobre Grande Company and the alleged actions of Greene and Mitchell in October, 1899, read like the complaint in the present suit and in the suit in which the judgment of April 15th was rendered.

The complaint alleges, in the first paragraph, that the Cobre Grande Company holds the title to and *right to the possession of* certain mines and mining property, and describes the property, and further alleges that Greene, Mitchell and the Cananea Consolidated Copper Company illegally entered upon said mines and are illegally holding the same. On the trial of the case, practically the only evidence offered were the contracts between Greene and Mitchell and the Cobre Grande, and testimony as to the proceedings taken by Greene in October, 1899, at the mines. The question, then, of the right of possession, as between the Cobre Grande Company and the Cananea Consolidated Company, was directly in issue, for a replevin suit, or a suit in the nature of a replevin, or conversion suit, can be brought by one having the right of possession, just as well as by one having the actual possession.

It has been contended on the part of Hallenborg that the El Paso judgment is not *res adjudicata* here, because in that suit the title to the property could not be tried, nor could any equity of the Cobre Grande Company be proved, and that, as the Cobre Grande Company did not have the legal title to the property, it could not recover.

But it is well settled that in such a suit the question to be tried is not who has the legal ownership of the property, but who has the right to the possession of it, and the whole theory of the complaint in the Cobre Grande suit

and in the present suit is that the Cobre Grande Company had the right of possession under the original contracts made between Mitchell and Greene, and that because it was ousted from possession, it was excused from making the payment of $37,500 on November 26, 1899.

In 20 *Am. & Eng. Encyc. of Law,* at page 1050, it is said:

> "It may be laid down as a general proposition that the *right of possession* and not the *right of property* is the issue to be tried in this form of action. Therefore, in order to retain the action of replevin, the plaintiff must show a right of exclusive possession in himself, as against the defendant in the action."

And again, at page 1055:

> "If the plaintiff show a *prima facie right to the possession* of the property, he should obtain a verdict, unless the defendant prove a better title."

In every possible aspect of the El Paso case, it must be considered that the judgment therein was *res adjudicata* on the question of who had the better right to the possession of the property in question.

We have referred to the El Paso case as a replevin suit, because it has pleased the plaintiff to refer to it continually by that title. As a matter of fact, the suit was an equity suit, in which the possession of the matter was demanded, and the question at issue was the same that would have been at issue in the replevin suit, namely, who had, at the time the property was taken out of the ground, the legal right to possession of the ground.

VI.

There is no necessity for a Receiver to sue.

At bottom plaintiff's action is simply a suit to have a receiver appointed with authority to bring an action in

the courts of Sonora, Mexico, to recover the property which it claims belongs to the Cobre Grande Copper Company under the option executed by Greene to Mitchell in November, 1898, and by Mitchell transferred to the Cobre Grande Copper Company.

A receiver will not be appointed in such cases, for the following reasons:

(a) Because in Arizona every action shall be prosecuted in the name of the real party in interest. (Paragraph 1299, Revised Statutes of 1901.)

(b) Ordinarily, an action to enforce rights or protect the interests of a corporation should be brought in the corporate name.

(c) Where the officers or managers of a corporation refuse, upon proper request, to bring such action, it may be brought in the name of the stockholders.

Wright v. *Oroville M. Co.*, 40 Cal., 20.
Ashton v. *Dashaway*, 22 Pac., 660, S. C., 23 Pac., 1091.
Hawes v. *Oakland*, 104 S. 450.
Davenport v. *Dows*, 18 Wall, 626.

A suit thus brought by a shareholder is in behalf of the corporation itself. In all such cases it is necessary to join the corporation as a party defendant, because the right asserted belongs to the corporation and it is an interested party.

Davenport v. *Dows*, *supra*.
Moyle v. *L. Admrs.*, 83 Cal., 579.
Bell v. *Donohoe*, 17 Fed., 710.
Danemeyer v. *Coleman*, 8 Sawyer, 51; S. C. 11 Fed., 97.
Hawes v. *Oakland*, 104 U. S., 450.
Smith v. *Dorn*, 96 Cal., 73.

A corporation though joined as a defendant, is so far considered the real plaintiff, that if it be a resident of the State in which the action is pending, and the stockholder plaintiff be an alien, the Federal Courts are ousted of jurisdiction.

Danemeyer v. *Coleman, supra.*

All of these cases and numerous other cases in all jurisdictions show that relief will be granted for the benefit of the corporation and for its stockholders, upon the suit of a stockholder without the intervention of a receiver.

In this Territory it has been settled by our Supreme Court that a minority stockholder has the right to institute a proceeding of the kind here, and to redress the wrongs and injuries similar to those complained of in this action, without the intervention of a receiver.

Wiser v. *Lawler,* 62 Pac., 695.

In the case of *Burns* v. *The City of Atchison*, 29 Pac., 582, the Court decides this precise question. It says:

> "It is said that the equitable jurisdiction of the Court to appoint receivers is not to be doubtingly exercised, and never where there is any other adequate remedy; but in this case, as has been stated, there is neither authority nor necessity for providing the City of Atchison with a representative or receiver. It is a competent party in any proceeding to protect its rights as a stockholder, and if the officers of the corporation have made fraudulent contracts, or are engaged in transactions which will result to the injury of the corporation or the city, as one of its stockholders, it may maintain an action in its own name to protect its own or the interests of the corporation, or to obtain any equitable remedy to which it is entitled. Ordinarily, an action to enforce rights or protect the interests of a corporation should be brought in the corporate name; but where the officers or managers of the corporation refuse, upon proper

request, to bring such action, it may be brought in the name of the stockholders. *4 Amer. & Eng. Enc. Law,* 280, and cases cited.

It is conceded by both parties that, if a cause of action exists in favor of the city in this case, it may be prosecuted in the name of the city; and, if that is true, what reason is there for the appointment of a representative of the city, and what authority is there for the substitution of another as plaintiff in its stead? The counsel for the receiver argue at great length and cite numerous authorities to sustain the right of the city as a stockholder to bring the action, and thereby has furnished an argument against the appointment of a receiver, and his substitution in the place of the city. If a cause of action exists in favor of a stockholder, and the corporation refuses to proceed upon proper request, the city, as a stockholder, is a real and competent party to bring the action, and there is no necessity or reason in substituting a next friend or receiver to sue for it."

VII.

The Court in this action and under the proof, has no right or authority to appoint a receiver, because no ultimate relief is sought, except the mere appointing of a receiver.

In the case of *Murray* v. *Superior Court,* 129 Cal., 632; 62 Pac., 191, the Court uses this language:

> "There is of course no such thing as an action distinctly brought for the appointment of a receiver. Such an appointment when made is ancillary to or in aid of the action brought. Its purpose is to preserve the property pending the litigation, so that the relief awarded by the judgment, if any, may be effective. The authority conferred upon the Court to make the appointment, necessarily presupposes that

an action is pending before it instituted by some one authorized by law to commence it."

This is in accordance with all the authorities found in the books on the subject.

In *Enc. of Pl. & Prac.*, Vol. 17, p. 682, the author says:

"The appointment of a receiver is not the ultimate end and object of litigation, but is merely a provisional remedy to control and preserve property pending litigation, that the relief awarded, if any, may be effective."

The same doctrine is laid down by Mr. High in his work on Receivers, Sec. 6, pp. 7 and 8; and

"The appointment of a receiver is regarded as one of the most difficult and embarrassing duties which a court of equity is called upon to perform. It is a peremptory measure, whose effect, temporarily, at least, is to deprive of his property a defendant in possession, before a final judgment or decree is reached by the Court determining the rights of the parties. It is, therefore, not to be exercised doubtingly, but the Court must be convinced that the relief is needful, and that it is the appropriate means of securing an appropriate end. It is regarded as a severe remedy, not to be adopted save in a clear case, and never unless plaintiff would otherwise be in danger of suffering irreparable loss."

High on Receivers, Sec. 3;
Smith on Receiverships, Sec. 2, says:

"The law of receiverships is peculiar in its nature, in that it belongs to that class of remedies which are only ancillary or provisional, and the appointment of a receiver does not affect either directly or indirectly, the nature of any primary right, but is

simply a means by which primary rights may be more efficiently preserved, protected and enforced in judicial proceedings. * * * It leaves the parties as they have placed themselves as determined by the final judgment or decree of the Court."

See also *Pom. Equity,* Paragraphs 171, 1319 and 1330;
Miller v. *Bowles,* 58 N. Y., 253.

POINT VIII.

A Court of Equity has no inherent power, in the absence of statutory authority, to appoint a receiver upon the application of a private person, except in cases of public or *quasi* public corporations, such as railroads, which are required to be kept going concerns, or in favor of judgment creditors, who have liens, or mortgagees who have liens, or in cases of infants, lunatics, and formerly married women; because the effect of the appointment is to dissolve the corporation, and it having received its life from the State by its charter or general law, the State only can dissolve it. Ever since the decision in the Dartmouth College case, it has been held that a corporation is a contract entered into between the sovereignty and the corporation. This contract cannot be annulled or interfered with by any action on the part of the Courts. On the contrary, they have upheld them, and for this reason clauses have been inserted in almost every State constitution reserving to the State the right to modify or repeal the charters.

In case of *Neal* v. *Hill,* 16 Cal., 150, this question was carefully considered by the Supreme Court of California, and it was there laid down as settled law that the appointment of a receiver must necessarily result in the dissolution of the corporation, and in that event the Court will have accomplished in an indirect way that which in this proceeding it has no authority to do directly. That it was well settled that a Court of Equity, as such, has no jurisdiction over corporate bodies, for the purpose of re-

straining their operations or winding up their concerns, and the Court add, "that we do not find any such power has ever been exercised in the absence of a statute conferring the jurisdiction."

1873, the California legislature adopted part of the provisions of the New York Code, but omitted to adopt certain independent provisions of that code, to the effect that a receiver of the property of the corporation could be appointed upon the petition of the execution plaintiff, when the execution issued upon a judgment rendered against the corporation had been returned unsatisfied in whole or in part, and when a corporation should have been declared insolvent for one whole year, or for that length of time had neglected or refused to pay its notes or other evidences of debt, or had for one year suspended its regular business.

In the celebrated *French Bank Case*, 53 Cal., 495, the Court held that these omitted provisions created rights in favor of private persons that did not exist before and enlarged the powers of the Courts of Equity in the State of New York by directly and in terms authorizing them in such cases to appoint receivers of the property of corporations upon application made to them by creditors, stockholders and other private parties instituting proceedings for that purpose, and held: That in the absence of any such authority conferred by statute, that a Court of Equity had no jurisdiction to make such an appointment, either under the statute or under the usages of Courts of Equity. In Arizona there is no statute conferring jurisdiction on Courts of Equity to appoint receivers except by usages of Courts of Equity. Section 1541, Rec. Stats. Arizona, 1901, is in substance the same as Subd. 6, Sec. 564 of California Code of Civil Procedure, which limits the power of the Court to appoint a receiver to cases allowed by usage of equity.

These decisions have been affirmed by the Supreme Court of California in

Murray v. *Superior Court,* 129 Cal., 631; 62 Pac., 191;

State I. & I. Co. v. *San Francisco,* 101 Cal., 146,

and cases cited from New York and other States.

Fisher v. *Superior Court,* 110 Cal., 140, and various other decisions in that State.

The Court of Appeals of New York in *Decker* v. *Gardner,* 124 N. Y., 334, holds that the jurisdiction to appoint receivers of corporation is wholly statutory and never was exercised by a Court of Chancery until their jurisdiction was enlarged by statute.

We have heretofore stated, that where the plaintiff has an interest in the property, for instance by vendor's lien or a mortgage, or by virtue of a judgment lien, and that the property is being wasted, that pending foreclosure proceedings, a Court of Equity has the power without statute to appoint a receiver to preserve the property until the litigation can be settled and determined; but this is only by virtue of his interest in the property and that it is being wasted.

See *Cook on Corporations,* Vol. 2, Secs. 746-747, 4th Ed., where the New York Statutes and rule are discussed.

In the case of the *Attorney General* v. *The Utica Ins. Co.,* 2 Johnson's Chancery, 375, Chancellor Kent holds that a Court of Equity has no visitorial powers over corporations and no power to remove the officers appointed by the charter to manage the business of the corporation; and in the same case held that the directors of a corporation are accountable to a Court of Equity for a fraudulent breach of trust.

The same effect—Matter of *Binghampton Gen. Electric Works,* 143 N. Y., 263.

Atty. General v. *Niagara Bank,* Hopkins Ch. (N. Y.), 354.

Waterbury v. *Mchts. Union Express Co.,* 50 Barb. (N. Y.), 157.

Verplank v. *War Ins. Co.,* Edwards Ch. (N. Y.), 84.

Hand v. *Dexter,* 41 Ga., 454.

Hamilton v. *Accessory Transit Co.*, 3rd Abbott Pr. N. Y., 255.
French v. *Accessory Transit Co.*, 3rd Abbott Pr. N. Y., 255.
French v. *Gifford*, 30 Iowa, 148.
Vanderbuilt v. *Central R. Co.*, 43 N. J. Eq., 669.

In Arizona, in the Revised Statutes of 1887, Sec. 233, among other things the following powers are conferred upon corporations:—Subdivision 2—To sue and be sued by the corporate name; subdivision 6, to make contracts, acquire and transfer property possessing the same powers in such respects *as private individuals now enjoy;* and Sec. 234, in subdivision 5, provides by what officers or persons the affairs of the corporation are to be conducted and the times at which they are to be elected.

The Articles of Incorporation of the Cobre Grande Company introduced in evidence specifies that the business of the company shall be managed by a Board of Directors. The statute and the articles of incorporation, taken together, prescribe the powers of the Cobre Grande Company; the tenure of its officers and the mode of their election. What power has a court of equity to set aside the statute or impose other conditions upon them, otherwise than as provided in the statute? The charter measures its powers and the manner of conducting its business and the persons who shall conduct it.

The cases above referred to also hold that the only method of forfeiting the charter of a corporation is by proceeding in the nature of *quo warranto,* and this is in exact accordance with the rule prescribed in the Revised Statutes of Arizona of 1901. Paragraph 28 provides: "that no corporation formed under the laws of this Territory shall be dissolved, or its rights impaired except by judicial procedure;" and the corporation, having received its life through the legislative grant above mentioned, can only be forfeited by the power that granted it. Par. 772 is a further limitation upon the powers of the court. That section provides that the corporation shall not be dissolved prior to the period fixed upon in the articles of incorpora-

tion, except by a majority vote of the members, except a different rule is adopted in the articles, and Par. 775 provides: "that corporations whose charters expire by their own limitations or by the voluntary act of the stockholders may, nevertheless, continue to act for the purpose of closing up the business, but for no other purpose, unless renewed as in this chapter provided."

Where the statute prescribes a particular method for dissolving a corporation, that method must of course be pursued.

People v. *P. & T. Co of C.*, 38 Cal., 172-173.

We have shown that the appointment of a receiver is in effect the dissolution of the corporation; then it must follow that the appointment sought for in this action is prohibited by the sections of the Revised Code above quoted.

A corporation has the same power over its corporate property, and is capable of taking and holding property, as wholly as natural persons, except in so far as they are restrained by statute. That under this general power, unless restrained by statute, a corporation may dispose of the whole of its corporate property for any lawful purpose without the assent of its stockholders.

People v. *P. & T. C. of C.*, 38 Cal., 171-172.

This case holds that property of a corporation can be disposed of without the assent of the stockholders, under a section of the California Code which is nothing like so broad as the paragraph of the Revised Statutes of Arizona of 1901, which gives the directors the power to make contracts as freely as individuals.

In 1880 the California legislature passed a statute the first section of which provides as follows: "That it shall not be lawful for the directors of any mining company to sell, lease, transfer or otherwise dispose of any part of the mining ground owned or held by said corporation, nor to purchase or obtain in any way additional mining ground unless such act be ratified by the owners of at least two-

thirds of the capital stock of such corporation," and provision is made as to the method of ratification.

In the case of the *Granite Gold Mining Co.* v. *Meginness*, 50 Pas., 269, 118 Cal., 132, the Supreme Court of that State (California) in construing that statute, held, that the general presumption of the power of corporations to buy and sell real property must prevail except in those cases where the facts appearing of record show that the case is within the restrictions of the Act of 1880, and that a sale is valid without the assent of the stockholders, unless it appears that the sale and conveyance are of its mining ground, for the reason that the restriction of the statute applies not to a sale of its real property generally, but only to that of its mining ground. In other words, that the plaintiff in that case was required to show that he was within the exception of the statute.

In *Willamette Mfg. Co.* v. *Bank of British Columbia*, 119 U. S., 191, the question was whether a corporation had the right to mortgage its franchise.

Appellants in that case, as in this, argued that a corporation could not do that because it destroyed the purposes for which the corporation was formed.

The statute creating the franchise, gave to the corporation "the exclusive right of the hydraulic powers and privileges created by the water it takes from the Santiama River, and declares that it may use, rent, *or sell*, the same, or any portion thereof as it may deem expedient."

Mr. Justice Miller says: "The charter itself seems to have given unlimited power to the Company to sell everything it had * * * and held that the power to sell included the power to mortgage." In other words, the Supreme Court in that case held what the courts have always held, that the charter is the measure of the power of the corporation, and that it could do anything that its charter authorized it to do.

The statute in Arizona, like the statute of Oregon, mentioned in the *Willamette Company* case, 119 U. S., 191, is an enlargement of the powers of the corporation.

Plaintiffs in their brief claim that the result of the contract of December 12th, 1900, destroys their rights, and

even go so far as to claim that the property of the Cobre Grande Copper Company was disposed of without consideration, and that they were deceived by concealment of secret provisions with reference to the $60,000 paid by Greene, which went into the treasury of the Company.

In the first place, Mr. Gage did not, nor did anybody, attempt to sell, or in fact sell any of the property of the Cobre Grande Copper Company. In the next place, there was no concealment whatever. The only property sold by Mr. Gage as agent or representative or otherwise, were the shares of the several stockholders who entered into the pooling agreement, and which were owned by them in private proprietorship. Findings 5, 6, 7 and 8.

The court found that Mr. Gage consulted the directors and a large majority of the stockholders of the Cobre Grande Copper Company and they urged him to enter into said contract with Greene for the sale of the stock. That said stock represented by Mr. Gage (Participating in said contract), comprised the entire stock of the Cobre Grande Copper Company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties.

IX.

The appointment of a receiver is one of discretion in the Court to be exercised as an auxiliary to the attainment of the ends of justice; is of high and unusual character, and is never exercised because of the fact that the appointment can do no harm. In order to obtain the appointment of a receiver, plaintiff must show, in cases where the property is in possession of defendant: first, that he has a clear right to it; and, secondly, that the possession of the property by defendant was obtained by fraud.

It is also held that the discretion of the Court to appoint a receiver will not be exercised where no perceptible benefit will result from the appointment, but great confusion and difficulty, and probably great injury to both parties, while

no injury will apparently be caused by failing to make the appointment.

Hamburg Mfg. Co. v. *Edsall,* 8 N. J. Eq., 142.

The record shows that the Cobre Grande Company is not in possession, but that Greene or the Greene Company is, and in the absence of any proof or finding of fraud, the presumption of law is that they are rightfully so. Fraud is never presumed but must be proved.

We have shown in the preceding pages of this brief that plaintiffs can secure by suit brought by them on behalf of the Cobre Grande Company every relief that a receiver or that the company itself could obtain if brought in its own name, and that it is unnecessary to appoint a receiver to sue on their behalf.

We respectfully submit that the judgment of the lower Court should be affirmed; and if the view of the counsel for the appellees as expressed in the first five points of this brief should be approved, it is respectfully suggested that an affirmance upon any one of such grounds would terminate this long and expensive litigation.

EUGENE S. IVES,

Attorney for Appellees, WM. C. GREENE, GREENE CONSOLIDATED COPPER COMPANY, and CANANEA CONSOLIDATED COPPER COMPANY.

M. E. Harvey.

NORTON CHASE,

Of Counsel.

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Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 87.

AXEL W. HALLENBORG AND J. EDWARD ADDICKS, Appellants,

vs.

COBRE GRANDE COPPER COMPANY, E. B. GAGE, W. M. ADAMSON, JOHN H. COSTELLO, J. HENRY WOOD AND CON. O'KEEFE, ITS DIRECTORS; WILLIAM C. GREENE, GEORGE MITCHELL, PHOENIX NATIONAL BANK, OF PHOENIX, ARIZONA TERRITORY, CANANEA CONSOLIDATED COPPER COMPANY, AND GREENE CONSOLIDATED COPPER COMPANY, Appellees.

Appeal from the Supreme Court of the Territory of Arizona.

STATEMENT AND BRIEF FOR APPELLEES.

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STATEMENT AND BRIEF FOR APPELLEES.

The Bill of Complaint.

The case alleged by the complaint, omitting formal and immaterial matter, is substantially thus:

Plaintiff sues in behalf of himself and all other stockholders of the Cobre Grande Copper Company, and all other creditors of said Company similarly situated who desire to come in and contribute to the expenses of the action, and alleges:

I.

That the Cobre Grande Copper Company is a corporation organized under the laws of Arizona Territory, having its principal office at Phoenix, Arizona, with a capital stock of $500,000.00 divided into 200,000 shares of $2.50 each. That defendant Gage is and has been a director and president of said corporation since November 14, 1899; that defendants Adamson, Costello and O'Keefe are and have been since November 27, 1900, directors of said corporation; that defendant Wood is now and has been since November 27, 1900, a director and secretary of said corporation; that defendant Phoenix National Bank of Phoenix, Arizona, is a corporation organized under the Laws of the United States, having its principal place of business at Phoenix, Arizona.

That defendant Cananea Consolidated Copper Company is a corporation organized under the laws of the State of Sonora in the Republic of Mexico.

That the Greene Consolidated Copper Company is a corporation organized under the laws of West Virginia, and the defendant Greene is now and has been since prior to January 1, 1900, president of said last named corporation, and a large stockholder therein. That defendants Greene and Mitchell, and their associates, confederates and agents are now and have been since the organization of said corporation, in control of and the

actual managers of both the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company.

1½.

That plaintiff Hallenborg resides in the City, County and State of New York, and defendants Gage and Adamson reside in Yavapai County, Arizona; that defendant Wood is a resident of Maricopa County, Arizona, and defendants Greene, Mitchell and O'Keefe reside in Cochies County, Arizona.

II.

That plaintiff is now and for a long time has been a stockholder in and creditor of the Cobre Grande Copper Company, and is now a creditor of said corporation of upwards of $40,000.00, part upon notes and part upon open account.

That plaintiff is the owner and holder of promissory notes made by the Cobre Grande Copper Company, of the dates, amounts and payable as follows, viz:

Date.	Amount.	Payable.
January 19, 1900....	$12,000.00.....	April 15, 1900
March 8, 1900.....	14,175.00.....	May 15, 1900
May 1, 1900.....	6,000.00.....	August 1, 1900
May 23, 1900.....	4,000.00.....	August 24, 1900
August 18, 1900.....	1,000.00.....	Nov. 18, 1900
June 29, 1900.....	1,905.25.....	October 1, 1900

Of the above mentioned notes, the first two were made payable to the order of one Benjamin Orne, and were

on November 13, 1900, transferred by Orne to plaintiff, and that plaintiff is now the holder and owner thereof; each of said notes bears interest at the rate of six per cent per annum from date. That nothing has ever been paid thereon, and that the whole amount payable by the face of said notes, viz: $39,080.25 and interest on the amount of each note from the date thereof is now due and owing.

That defendant Cobre Grande Copper Company is also indebted to plaintiff several thousand dollars for cash advances by plaintiff to the said corporation, for which no notes have been issued.

That plaintiff is a stockholder in the Cobre Grande Copper Company of upwards of 8,000 shares, and has been since about the 15th of July, 1900.

III.

That since prior to January 1, 1900, the Cobre Grande Copper Company has been engaged in a series of litigations with defendants Greene, Mitchell, and their associates and confederates, which litigations are as follows, and were based upon the claims, charges and allegations made by the Cobre Grande Copper Company in that behalf.

That in the fall of 1899 the Cobre Grande Copper Company was in possession of certain valuable mining properties situated in the Cananea Mountains, State of Sonora, Republic of Mexico, under and by virtue of a contract originally made by defendant Greene, then the owner of said properties, to defendant Mitchell, and by said Mitchell, about May 26, 1899, transferred to defendant Cobre Grande Copper Company with

the consent of said Greene, by virute of which contract and transfer and consent, the defendant Cobre Grande Copper Company became entitled to the ownership and possession of said mining properties. Thereafter, about September, 1899, defendants Greene and Mitchell, being at that time directors of the Cobre Grande Copper Company, in confederation with certain others, formed a scheme to deprive the Cobre Grande Copper Company of said property and acquire it for themselves; and on or about October 11, 1899, in pursuance of this scheme by certain fraudulent tricks and devices, they obtained the actual possession of said properties and ousted therefrom the defendant Cobre Grande Copper Company and its agents and servants; said Greene being then in physical possession of said properties, claimed to be the owner of them, and thereupon, in confederation with one of his attorneys, Norton Chase, he organized under the laws of Sonora, Republic of Mexico, where the mines were situated, the corporation Cananea Consolidated Copper Company; the said corporation, however, being in fact composed only of himself and attorney, said Norton Chase. Thereupon Greene executed, in apparent conformity with the laws of the Republic of Mexico, a deed of all said properties, of which he had unlawfully taken possession, to the Cananea Consolidated Copper Company, and since then the said corporation has claimed to be the owner thereof and has exercised acts of dominion and control over them. That the said Cananea Consolidated Copper Company has never of itself carried on any business, and the object of forming it was to comply with the laws of Mexico, which prevent a foreigner or a foreign corporation from owning land within what is known as the "Prohibited Zone," in which district said mines are

situated, and that all of the stock of the Cananea Consolidated Copper Company was immediately transferred by Greene to defendant the Greene Consolidated Copper Company, which said Greene caused to be organized under the laws of West Virginia with a capital stock of $5,000,000, divided into five hundred thousand (500,000) shares of the par value of $10.00 each, and since then said Greene Consolidated Copper Company has claimed to be the owner of and to be operating said mines of which defendant Cobre Grande Copper Company was ousted by the defendant Greene, and has largely advertised the sale of its stock and claimed to have a good and clear title to said property, but both the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company were and are mere tools and instruments used by Greene and his confederates in furtherance of their fraudulent schemes and organized solely for that purpose.

That upon being ousted from said property, the Cobre Grande Copper Company instituted certain legal proceedings in the courts of Sonora, Mexico, where said property is situated, to recover possession of same and appurtenances and supplies from defendants Greene, Mitchell, the Cananea Consolidated Copper Company, and the Greene Consolidated Copper Company, and for the recovery of a large amount of the product of said mines appropriated by said last named defendants, or by Greene, to their own use, and the said proceedings are still pending and undetermined.

That defendant, the Greene Consolidated Copper Company, after having, by the means aforesaid, gotten into possession of said mines, proceeded to extract ore therefrom and to turn it into copper matte, and to ship same to various places in the United States; and that there-

upon the Cobre Grande Copper Company claiming under the agreement between Green and Mitchell and assigned to and owned by it, to be the owner of the ore in said mines, about the months of January and August, 1900, brought action in the nature of replevin to recover possession of the matte so shipped, which actions were brought in New York City and at El Paso, Texas, and that thereupon the Greene Consolidated Copper Company, or some of its agents, attorneys or confederates, put in an adverse claim to same, and that the litigation in regard to said matte called the "matte suits,' is still pending and undetermined.

That Greene and Mitchell and their confederates, also attempted to get control of defendant Cobre Grande Copper Company by use of stock held by them in that Company, which was less than the majority thereof, and they claimed and pretended in November, 1899, to have held a regular meeting of stockholders for the purpose of electing directors of said Company, and claimed that said Greene, Mitchell and certain of their confederates had been duly elected directors of said Company and officers thereof, although as a matter of fact the meeting at which they claimed to have been elected directors, was not a regular meeting of stockholders, and that thereupon Greene, Mitchell and their confederates claimed that they were such officers and directors of the Cobre Grande Copper Company and endeavored to exercise the powers and functions of such officers and directors; and about the month of December, 1899, upon an application of defendant Gage, who was at that time the duly elected President of the Cobre Grande Copper Company, proceeding in the nature of *quo warranto* was taken by the Attorney General of Arizona to enjoin said Greene and his confederates from acting or assuming to

act as officers and directors of the Cobre Grande Copper Company, and that said action and proceedings is still pending and undetermined.

That said Greene and his confederates in order to further embarrass the Cobre Grande Copper Company, and hinder and delay it in the prosecution of its rights against them, about the month of December, 1899, caused one Isabella Chase, one of its confederates and stockholders, or pretended stockholders in the Cobre Grande Copper Company, to apply to the courts of the Territory of Arizona for a receiver of said corporation, on the ground of insolvency, and for other reasons, and that said suit is now pending in the courts of Arizona Territory undetermined.

That defendant Greene confederating with defendant Mitchell and other persons interested with him in the Greene Consolidated Copper Company, also claimed and pretended that the contract between Greene and Mitchell for the sale and purchase of said mines had lapsed and terminated on account of the failure to make a certain payment of $37,500.00 thereon which was claimed to have been due on November 26, 1899, and thereupon said Greene applied to defendant Phoenix National Bank of Phoenix, Arizona, to deliver to him certain deeds to the said mines which had been placed in escrow with said bank by defendants Greene and Mitchell; and thereupon the Cobre Grande Copper Company brought an action in Maricopa County, Arizona, against Greene and Mitchell and the Phoenix National Bank to prevent the delivery by it of said deeds, and to have the rights of the Cobre Grande Copper Company in and to said contract of sale and purchase determined and adjudged. That said action was brought in aid of the efforts of the Cobre Grande Copper Company to recover the said

properties in Mexico, and a part of the relief demanded in said action was that the plaintiff therein, the Cobre Grande Copper Company, might be permitted, within a reasonable time after its restoration to the possession of said mines, to make said payment of $37,500.00, which payment it was alleged Greene and Mitchell had prevented by their fraudulent acts and misconduct as aforesaid, and further that Greene might be required to account to the Cobre Grande Copper Company for the proceeds of the product of said mining claims together with all supplies, material and property of the Cobre Grande Copper Company taken and appropriated by him.

That all the defendants in that action appeared therein and answered on the merits. A preliminary injunction was granted by the court in accordance with the prayer of the complaint restraining the delivery of said deeds, and an order made continuing the same pending the action, and the cause was duly tried before Hon. Webster Street, Judge, and a decision thereon reserved, all on or before December 1, 1900, and all on or before the agreement to discontinue as hereinafter set forth, and there was and is much and reasonable probability of said action being decided favorably to the Cobre Grande Copper Company, as plaintiff has been informed by counsel learned in the law and verily believes, and the said action is pending and undetermined.

That each and every one of said litigations, suits, actions and proceedings were a part of the dispute and controversy originating out of and connected with the claim of said Greene and his agents, including the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company to get control and possession of all the property of the Cobre Grande Copper Company and especially of the mining property afore-

said; and each and every of said suits, actions and proceedings which were begun and commenced by the Cobre Grande Copper Company or in its behalf, were meritorious and well founded in law and in equity, and all were necessary steps and proceedings to defeat the fraudulent schemes and designs of said Greene and his confederates, associates and agents aforesaid, and to save and protect the property and the existence of the Cobre Grande Copper Company, and in each and every of said actions and proceedings where the Cobre Grande Copper Company appeared as defendant, it was defending for the purpose of maintaining its just rights and claims to its property against the unlawful attacks of said Greene, his confederates, associates and agents, made in pursuance of said fraudulent schemes. By means of the corrupt, wicked and unlawful acts and misconduct of defendants, Greene, Mitchell and their confederates, including the Cananea Consolidated Copper Company and the Greene Consolidated Copper Company, the Cobre Grande Copper Company, whose directors and trustees Greene and Mitchell were or claimed to be when they ousted said corporation from its property, has been unlawfully deprived of the possession and use and enjoyment of its property, and the proceeds thereof have been diverted to the use of Greene, Mitchell, and their confederates, and by the same means the said Greene, Mitchell and the said two corporations organized by them, claimed to have deprived the Cobre Grande Copper Company of all right and interest in and all right to recover possession of said property, to the ruin and destruction of the Cobre Grande Copper Company and the great loss and damage of the plaintiff as a stockholder therein and creditor thereof, and a like loss and damage of other persons similarly situated.

IV.

That just prior to December 12, 1900, defendants Greene, and the Greene Consolidated Copper Company, their associates, confederates, etc., conspired together to get control of the Cobre Grande Copper Company in order to stop the litigation against them and secure the undisputed possession of the mines from which the Cobre Grande Copper Company had been ejected, and for the purpose of controlling the suits brought by the Cobre Grande Copper Company as aforesaid, in which they anticipated an unfavorable decision, which would restore the Cobre Grande Copper Company tc possession of its property and to deprive the Greene Consolidated Copper Company of the property belonging to the Cobre Grande Copper Company upon which its stock had been issued and which was then selling in the market at $10.00 per share; and thereupon they entered into a fraudulent contract and conspiracy with defendant Gage and the other directors of the Cobre Grande Copper Company, whereby it was agreed between Greene and the Greene Consolidated Copper Company by said Greene as its president on one side, and the defendant Gage and the Cobre Grande Copper Company by Gage as president on the other side, as follows: Defendant Gage then held as trustee for certain stockholders of the Cobre Grande Copper Company 115,049 shares of its capital stock, being a majority thereof, the power to dispose of same, and thereupon defendants Greene and the Greene Consolidated Copper Company agreed to buy of said defendant Gage said shares of stock at $2.50 per share, and Gage and the other defendants, Adamson, Costello, Wood and O'Keefe, directors of said corporation, as part of said transaction agreed that upon pay-

ment of said stock being made they would each and every of them resign as directors of the Cobre Grande Copper Company, and that Greene and the Greene Consolidated Copper Company should be allowed to elect and appoint officers and directors of the Cobre Grande Company in their own interest; and that further, all suits and proceedings above mentioned brought by the Cobre Grande Company for the protection of its rights against Greene, Mitchell and the Greene Consolidated Copper Company, should be dismissed, to the end that no claims should be made by the Cobre Grande Copper Company for and in respect of the said property in Mexico of which it had been ousted by Greene and his confederates. It was further agreed that Gage should have and receive 5,000 shares of the stock of the Greene Consolidated Copper Company for his own benefit, which stock was at that time selling on the market at $10.00 per share; and it was further agreed that defendant Costello, a director of said corporation, should have his note of $23,000.00 to the Cobre Grande Copper Company surrendered to him.

That said agreement which was made about December 12, 1900, did not provide for any personal benefit to the other directors, Adamson, Wood and O'Keefe, except the purchase of stock held by them in the Cobre Grande Copper Company; but plaintiff alleges on information and belief, that by a secret compact made between them and Greene and the Greene Consolidated Copper Company, each of them has contracted for and expects to receive large personal gain, either by transfer to him, or for his benefit, of stock in the Greene Consolidated Copper Company, or by some other transfer or payment to him, or for his benefit.

That the agreement of December 12, 1900, was made

by Gage acting for and on behalf of the Cobre Grande Copper Company as president thereof, and as trustee for the holders of said 115,049 shares of the stock above mentioned, and was made with the knowledge and consent of the other directors of the Cobre Grande Copper Company, to wit: defendants Adamson, Costello, Wood and O'Keefe; and thereafter all of said defendants held a meeting as directors of the Cobre Grande Copper Company and assumed to ratify said agreement on behalf of the Cobre Grande Copper Company and said directors and each of them have conspired together to carry out the same, and intend and threaten to carry out said agreement and turn over the management of the Cobre Grande Company to its enemies and plunderers, the said Greene and the Greene Consolidated Copper Company. And in view of the facts and circumstances aforesaid, any application to the directors or officers of the Cobre Grande Copper Company to take action in the premises to protect the rights of plaintiff and other stockholders and creditors similarly situated, would be unavailing.

That said agreement was and is illegal and fraudulent as to plaintiff and all creditors and stockholders similarly situated, and the object and effect thereof was to transfer to the opponents and enemies of the Cobre Grande Copper Company the control of that corporation with intent and design to prevent the enforcement of its just claims against said Greene and the Greene Consolidated Copper Company and their agents and confederates who were in possession of and unlawfully withholding the property of said Company and to enable Greene and his confederates to destroy the rights of the creditors and minority owners of the stock in said Cobre Grande Company, including plaintiff.

V.

That said mining claims in Mexico concerning which said litigation exists and of which the Cobre Grande Company has been endeavoring to obtain possession and which are unlawfully withheld by Greene and the Greene Consolidated Copper Company, constitute the entire property of the Cobre Grande Company, and upon the discontinuance of such suits the Cobre Grande Company will have no property or funds to pay its debts or distribute as dividends among its stockholders; and said last named agreement is illegal and fraudulent and a total failure on the part of the officers and directors of the Cobre Grande Company to legitimately perform the duties of their trust and a virtual repudiation thereof by them, and if allowed to be carried out of this court, will destroy the interests of plaintiff as a creditor and stockholders and all others similarly situated.

The mining property of which the Cobre Grande Company is seeking to recover possession, is of great, present, and prospective value, namely, $5,000,000.00 or thereabouts.

That plaintiff purchased the stock of said corporation and advanced money as aforesaid for the purpose of legitimately developing the property and of investing therein and holding said stock as an investment with the view of the development of said property and the large appreciation of said stock in value. That part of the intent of the transaction of December 12, 1900, was and is to compell plaintiff and other stockholders similarly situated to sacrifice their stock to Greene, Mitchell and their confederates at $2.50 per share or less, whereas the said stock is worth much more, and plaintiff expects, if

the property is properly managed, that said stock will appreciate in time to $25.00 per share.

That defendants Greene and Mitchell and the said two corporations controlled by them, and their confederates, threaten and intend to carry out the scheme aforesaid to wreck the Cobre Grande Company and compel the minority stockholders to sell their stock to them at terms to be dictated by said Greene, Mitchell, and their confederates, when they shall be in control of a majority of said stock, and ultimately to turn over all the assets and property of the Cobre Grande Company to Greene and Mitchell, or the Greene Consolidated Copper Company, or some other combination controlled by them.

That neither Greene, Mitchell, nor the Cananea Consolidated Copper Company, nor the Greene Consolidated Copper Company is nor are they responsible or any of them able to respond in damages to plaintiff for the wrongs perpetrated and intended by them, nor has plaintiff, nor will he have, any adequate remedy in law.

That the Cananea Consolidated Copper Company is a foreign corporation without property in Arizona or the United States, and that it and the Greene Consolidated Copper Company and each of them are without assets of any kind, the only property claimed to be owned by them consisting of the properties of the Cobre Grande Copper Company unlawfully seized and taken by them as aforesaid.

The prayer is, that the Cobre Grande Copper Company and the defendants, its directors and officers, and all others, be enjoined from discontinuing or dismissing the actions and proceedings now pending in its behalf, or in which it is interested, namely the actions and proceedings in the nature of replevin pending in the States of New York and Texas, for the recovery of said matte, or

the proceeds thereof, or to establish a lien thereon; that they be enjoined from discontinuing or dismissing the two suits pending in the district court of Maricopa County, Arizona, and from abandoning or dismissing the actions or proceedings pending on behalf of the Cobre Grande Copper Company in Mexico or elsewhere for the recovery of the mines and property rights of the Cobre Grande Copper Company, and for a mandatory injunction directing the Cobre Grande Copper Company and the defendants, its officers, directors, etc., to faithfully prosecute in its behalf all actions and proceedings brought by any of the defendants for the recovery of said property or property rights, or any property or rights of the Cobre Grande Copper Company. That plaintiff be made a party plaintiff to said actions and proceedings so far as necessary to protect his rights; that it be adjudged that he have a right to intervene in said suits and proceedings in Arizona, New York, Texas, or elsewhere, for the protection of his interest and other persons similarly situated.

That defendants Gage, Adamson, Costello, Wood and O'Keefe be removed as directors, president and secretary respectively; that a receiver be appointed to take possession of the assets and property of the Cobre Grande Copper Company, and to prosecute the claims aforesaid and to recover, protect and defend said properties, claims, etc., from and against Greene, Mitchell, and their confederates, and the remaining defendant corporations herein, and to defend the Cobre Grande Copper Company from the conspiracies and assaults of said defendants, and to operate said mines.

That defendants Greene and Mitchell be restrained from demanding and receiving from the Phoenix National Bank, or other custodian, the papers and docu-

ments constituting and evidencing the title to said properties; that the Phoenix National Bank be restrained from delivering said papers and documents to the defendants Greene or Mitchell, or either of them, or to any other person or corporation except the Cobre Grande Copper Company, or said receiver, and that the time for the payment of the installment of $37,500.00, and all other installments under said contract for the purchase of said mining properties of said Cobre Grande Copper Company, be extended to a reasonable time after it shall be restored to the possession of said mining claims, or to such other times as to the court may seem just.

That defendants Greene, Mitchell, Cananea Consolidated Copper Company and the Greene Consolidated Copper Company be required to account to the defendant Cobre Grande Copper Company for the property of said Company, including the product of the mines, supplies and material appropriated by them, and to pay any amount due on such accounting, and for such further relief as may be just, and costs. (Tr. of Rec., pages 1 to 11.)

THE ANSWERS.

Cananea Consolidated Copper Company, Greene Consolidated Copper Company and William C. Greene.

Cananea Consolidated Copper Company, Greene Consolidated Copper Company and Greene, in their answer plead to the jurisdiction of the court, and allege that the complaint does not state a cause of action; that it is multifarious, combines several distinct and separate causes of action; that the complaint states no ground for equitable relief; and further answering, denies each and every material allegation of the complaint; denies that plaintiff is either a stockholder or a creditor of the Cobre

Grande Company; denies all the allegations of fraud or fraudulent conspiracy; denies that the Cobre Grande Copper Company is or ever was the owner of the mining ground alleged in the complaint, or was ever entitled to the possession of same.

Avers that the indebtedness alleged in the complaint was made for no good or lawful consideration; that if said notes were executed or money advanced as alleged, it was for an illegal and champertous purpose to abet litigation and controversy in which plaintiff had no interest, and for stock jobbing purposes, and in order that he might purchase stock of defendant Greene Consolidated Copper Company at a less price than what it was selling for in the market; that the consideration is void as against public policy; that defendants further allege on information and belief, that the Cobre Grande Copper Company has long since paid to plaintiff all of said indebtedness; alleged that there was filed in the District Court of the Third Judicial District of Arizona in and for Maricopa County, on November 25, 1899, a certain suit, wherein the Cobre Grande Copper Company was plaintiff, and Greene, Mitchell and the Phoenix National Bank were defendants, No. 3437 upon the docket of said Court, and in which suit the Cobre Grande Copper Company alleged in substance all of the allegations set forth in paragraph 3 of the original complaint filed in this cause. That answers were filed in the said suits by defendants and issue joined.

That said cause proceeded to trial on the issues involved, large numbers of witnesses were called, trial consumed from six to ten days of uninterrupted proceedings of the Court; that the cause was finally submitted for decision, and that the Court having fully considered the cause and the allegations in the complaint,

found the issues for defendants, and found that the Cobre Grande Company had not performed the conditions of its contract set forth, and had forfeited all its rights and titles by virtue of the contract alleged between Greene and Mitchell and assigned to the Cobre Grande Copper Company, and the supplemental contract with Greene and the Cobre Grande Copper Company as alleged in paragraph 3 of said complaint. Found that Greene had not wrongfully taken possession of said property; that said Company had failed to perform the condition of its contract to pay the purchase price for said mining ground by no fault or wrong of Greene, and ordered that the injunction restraining the bank from delivering the contracts alleged in said paragraph 3 be dissolved; that the defendant bank be ordered to deliver the said escrow papers and contracts in its custody to Greene for the reason that the Cobre Grande Copper Company had forfeited all its rights thereunder. Pleads said judgment in bar of this action. Also pleads that on January 31, 1900, there was commenced in the 34th Judicial District of the State of Texas in El Paso County of said State, a certain suit wherein the Cobre Grande Company was plaintiff and Greene, Mitchell, Geo. A. Treadwell and Win Wiley were defendants, in which plaintiff alleged in substance all of the allegations set forth in paragraph 3 of the original complaint filed in this cause. That issues were joined in said suit, and that the case was submitted to a jury and the jury found against the plaintiff and in favor of the defendants, which judgment was pleaded in bar.

They further allege that the contract of December 12, 1900, was the result of several days negotiations as to its terms and conditions. That prior to that time 115,000 shares of the stock of the Cobre Grande Copper

Company had been placed in the hands of defendant Gage as trustee with power and authority by him and on his part to act for all the beneficiaries of said trust; that among the beneficiaries was plaintiff Hallenborg who placed in the hands of said Gage, under and by virtue of said trust, 8,000 shares of the stock of the corporation, and that at the time of the negotiations all of Hollenborg's stock was in the hands of Gage. That by virtue of the terms of the contract of trust by which defendant Gage held the stock, said Gage was made attorney in fact for all the beneficiaries of said trust, including Hallenborg; that he was authorized to sell all of said stock so put in his hands at such price and upon such terms as he might see proper; that there were in the neighborhood of twenty or more owners of stock besides plaintiff; that most of them were not present during the negotiations, had no knowledge thereof and therefore it was provided in said contract that any of the stockholders named in said trust "may withdraw their stock from this agreement," to wit, the agreement of December 12, 1900, if they so wished to do; but said defendants allege that said Hallenborg was and in the person of and by his attorney in fact and his attorney-at-law authorized and representing him, to wit, one Grant Bennett, present in Phoenix at the time said negotiations which led up to the contract of December 12, 1900, was present at all conferences and consultations with reference thereto between Gage and his representatives and said Greene acting for the Greene Consolidated Copper Company, and also in all the consultations between Gage and the beneficiaries of the trust in his hands, and that he had full knowledge of all the negotiations as they progressed, suggested changes and modifications in the terms of the contract, all of which were complied with, and that he, said

Bennett was, during the negotiations, in telegraphic communication with plaintiff, and that plaintiff was fully informed of all the negotiations; that said Bennett fully approved the same, and but for his approval on behalf of plaintiff, Greene would not have executed said contract, and by reason and by virtue and in consideration of the approval and consent of said attorney on December 12, 1900, the contract was executed on behalf of Greene, and fifty cents per share for 115,000 shares, the first payment therefor provided in said contract, was paid to Gage, for which $4,000.00 was paid to Gage on behalf of plaintiff and with the knowledge and approval and complete ratification of plaintiff by and through his attorney in fact Grant Bennett.

That thereby the first consideration in the performance of said contract was executed by Greene, and he was induced by plaintiff and said attorney to pay over to Gage more than $50,000.00 in cash for the beneficiaries of said contract, $4,000.00 of which was paid for the benefit of Hallenborg, and thereby Hallenborg became party to and bound by the terms of said contract of December 12, 1900, and that Greene was induced thereby and thereafter performed all the conditions of said contract paid to the said Gage the full amount of $2.50 per share for said stock as provided in said contract, and all other terms and conditions of same were performed by Greene, and the said contract having been executed and been partly performed by Greene with the knowledge, consent and approval of said Hallenborg by his attorney in fact and attorney-at-law, said Hallenborg is estopped to repudiate and prevent the execution of said contract on the part of Gage and the repudiation of said contract by Hallenborg is a loss to Greene of the benefits of the contract, and after he had partly executed

the same. And by way of setoff and reconvention, defendants allege that the repudiation of the contract and the violation of its terms by Hallenborg, is a breach, and that thereby defendants have been injured and damaged in the sum of more than $100,000.00.

They allege that after the contract had been partly executed by Greene by the payment of fifty cents per share for 115,000 shares of the stock, Hallenborg in repudiation of and violation of the contract ratified and confirmed on December 12, 1900, appeared in said Court in Maricopa County in said case after same had been submitted for decision and asked to be allowed to intervene and set up all the matters set forth in paragraph 3 of the original complaint filed herein. Alleged fraud and fraudulent conspiracy on the part of the parties to said contract; that the Cobre Grande Copper Company had been defrauded of its rights; that it was the owner of the mining ground in Mexico when he, plaintiff, knew that said Company did not own and never had owned any mining lands in Mexico or elsewhere, falsely alleging that all the mining ground which was owned or claimed by defendant Greene Consolidated Copper Company was really and in fact owned by Cobre Grande Copper Company, and that by the fraudulent conspiracy set forth in paragraph 3 said Cobre Grande Copper Company had been deprived of its rights in Mexico, also alleged in his complaint all the allegations in this complaint contained, and having filed the said petition for intervention, he caused the same to be published far and wide in newspapers throughout the country, and that the said petition in intervention was not made in good faith, but for the purpose of publishing the allegations in said complaint; that the said suit was not commenced in good faith for the purpose of enforcing any rights but

for the purpose of bearing the stocks of the Greene Consolidated Copper Company and the value thereof, in order that he might purchase the same for less price, and that the suit was brought for the purpose of publishing to the public throughout the country and to the knowledge of proposed purchasers of stock of the Greene Consolidated Copper Company for the purpose of injuring said Company and defendant Greene. That said proceedings was followed afterwards by this suit for the same purpose and another suit was brought in New York in which the same allegations are made. That all of these suits were from time to time heralded throughout the country in newspapers; and publication was paid for by plaintiff, and the same was brought by plaintiff to injure the stock and value of the stock of the Greene Consolidated Copper Company to the injury of said Company and of said Greene. That the same was a slander upon the title to the real estate owned and operated by the Greene Consolidated Company, and that the Greene Consolidated Copper Company is a mining company operating large and extensive mines in Mexico and its stocks have great value, and that the market value of same has been injured and lessened, and proposed purchasers have been induced not to do so by publications of Hallenborg, whereby by this suit and other suits and said publication, defendants have been damaged in a sum in excess of $100,000.00, which they pray may be allowed as a setoff and recoupment.

They also allege by way of setoff and reconvention, that plaintiff as a stockholder of the Cobre Grande Copper Company knew that the Cobre Grande Copper Company did not own and never owned any mining ground in Mexico or elsewhere.

Allege that the Cobre Grande Copper Company had

a contract by which it had a right to purchase mining grounds in Mexico; that deeds for the conveyance of same were placed in escrow to be delivered upon the payment of the purchase price; that the purchase price has not been paid; that all the rights, titles, claims, etc., of the Cobre Grande Copper Company and of plaintiff as a stockholder, have been lost and forfeited by its failure to perform the conditions of the escrow contracts; that the claim to own the mining grounds hereinbefore described, is a cloud upon the Green Consolidated Copper Company to the mining grounds included in said escrow contracts and is an injury to the rights of the Greene Consolidated Copper Company. That the claim of title or ownership to the mining grounds since acquired from Greene by conveyance to the Greene Consolidated Copper Company is without right. That in suit No. 3437 in the District Court of Maricopa County, Arizona, all the rights of the Cobre Grande Copper Company were fully and completely adjudicated, and all claim of right of the Cobre Grande Copper Company was adjudged to be lost and forfeited and that the Cobre Grande Copper Company has no right or interest in and to the said mining grounds, and prays for judgment accordingly. (Trans. Rec., pp 12-20)

John H. Costello.

Defendant Costello admits the allegations contained in paragraphs 1 to 3 of complaint; admits that prior to and about December 12, 1900, that Greene and the Greene Consolidated Copper Company and associates sought to secure the control of the Cobre Grande Copper Company, but whether the purpose was, as alleged, to stop litigation and secure undisputed possession of the mines, defendant has no knowledge sufficient to affirm

or deny. Says he has no knowledge that the parties securing control of the Cobre Grande Copper Company anticipated an unfavorable decision in pending suits; has no knowledge of the Greene Consolidated Copper Company stock selling on the market at $10.00 per share, nor of the entering into fraudulent or corrupt conspiracy on the part of Gage and other directors of the Cobre Grande Copper Company with Greene and the Greene Consolidated Copper Company. Alleges that so far as he had anything to do with the contract as a director of the Cobre Grande Company or individually, his acts were not fraudulent or in pursuance of any conspiracy. Admits that Gage as trustee held the shares of stock as alleged, with power to dispose of the same, and that Greene and the Greene Consolidated Copper Company agreed to buy 115,049 shares, which was a majority of the stock, at $2.50 per share, and that upon payment in full of same, defendant, with the other directors of the Cobre Grande Copper Company, agreed to resign as such directors and allow the purchasers to elect their own directors and officers, and thus allow the new management to conduct its business as it saw fit, which would include the right to dismiss all pending suits. Admits Gage was to receive 5,000 shares of the stock of the Greene Consolidated Copper Company as a personal benefit; and that the note of this defendant for $23,000 was to be surrendered to him by the Cobre Grande Company. Has no knowledge or information on the subject that there was some secret compact with the directors Adamson, Wood and O'Keefe by which they were to receive personal gain from Greene or the Greene Consolidated Copper Company on account of the part they took as directors in the execution of the contract of December 12, 1900. Admits that said contract was made by Gage

acting as president of the Cobre Grande Copper Company and as trustee for 115,049 shares of stock, and was done with the consent of the directors; admits that said directors, he acting with them, held a meeting of the Cobre Grande Copper Company and assumed to and did ratify said agreement on behalf of said Company, and that it was their purpose to carry out said agreement in all respects as in the contract provided, and that had said Greene and the Greene Consolidated Copper Company carried out their part of said contract, this defendant and others for whom Gage was acting as trustee in executing said agreement, would have carried out and stood by the same.

Defendant denies that said agreement was illegal or fraudulent as to plaintiff or others, and that the intent and design was to prevent the enforcement of the claims of the Cobre Grande Company against Greene and the Greene Consolidated Copper Company. Admits that the mining claims in Mexico, concerning which litigation was pending when the contract of December 12, 1900, was made, constituted the sole property of the Cobre Grande Copper Company, and should it fail in its efforts to recover the same, it would have no assets with which to pay its creditors. Alleges that such fact was no concern of his in making the sale of his stock in the Cobre Grande Company. Admits the mining claims were of large value, and that plaintiff purchased stock therein and advanced the money claimed by him to have been done. Denies each and every allegation in the complaint charging conspiracy, collusion or corruption on his part, or any intent to injure plaintiff or others in securing their rights against the Cobre Grande Copper Company. (Tr., pages 20-22.)

Cobre Grande Copper Company, Phoenix National Bank, and Gage, Adamson, Wood and O'Keefe.

Defendants Gage, Adamson, Wood, O'Keefe, the Phoenix National Bank and the Cobre Grande Copper Company demur on the ground that the complaint does not state facts sufficient to constitute a cause of action, and answering to the merits.

Allege that there was instituted in the District Court of the Third Judicial District of Arizona in and for Maricopa County, on the —— day of ——, ——, a certain suit, wherein the Cobre Grande Copper Company was plaintiff and Greene, Mitchell and the Phoenix National Bank were defendants, No. 3437, in which the Cobre Grande Copper Company alleged, among other things, in substance all of the facts set forth in paragraph 3 in the original complaint on file in this action.

That issues were joined thereon; that the cause proceeded to trial on the issues involved, and that the court found the issues for the defendants, and that the Cobre Grande Copper Company had not performed the conditions of its contract set forth in said action, in the 3d paragraph of the original complaint in this action, and had forfeited all its rights under the contract alleged between Greene and Mitchell and assigned to the Cobre Grande Copper Company by said Mitchell, and the supplemental contract of Greene with the Cobre Grande Copper Company; also found that Greene had not wrongfully taken possession of the property, but that the Cobre Grande Company had failed to pay the purchase price for said mining properties, not by any fault or wrong of Greene, and gave judgment in accordance with the said findings and decree; that the temporary injunction enjoining the Phoenix National Bank from deliver-

ing the contracts, deeds and papers held in escrow by it be dissolved, and that the Phoenix National Bank be ordered to deliver the said escrow contracts, deeds and papers in its custody to Greene, and denied plaintiff's prayer for an accounting against said Greene.

The answer further alleged the judgment so rendered by said courts is in full force and effect, and has not been appealed from nor taken up to the appellate court of the Territory by writ of error or other proceedings, and plead the same in bar of plaintiff's right to recover in this action.

And defendants further say that at the time said judgment, and decree was rendered and for a long time prior thereto, plaintiff was a stockholder in the Cobre Grande Copper Company, and that the judgment against it is binding and conclusive against plaintiff by reason thereof.

Further answering these defendants allege that on January 31, 1900, there was commenced in the District Court in El Paso, Texas, a suit wherein the defendant Cobre Grande Copper Company was plaintiff, and Greene, Mitchell, Treadwell and Wiley were defendants, in which plaintiff alleged in substance all the allegations set forth in paragraph 3 of the original complaint filed in this case; and alleged, among other things, that plaintiff was entitled to the possession of the mining ground in the complaint herein described, and the right to extract and market the ores therefrom, and alleging that defendant Greene and others had wilfully and without right, forcibly deprived said Company of the possession of said mining ground and had extracted ores therefrom and converted the same into matte and shipped the same to the County of El Paso, Texas; that the proceeds of the same were in possession of the Con-

solidated Kansas City Smelting & Refining Company, and was of the value of $9,000.00, and that the same was the property of the Cobre Grande Copper Company by means of the premises alleged as aforesaid, and demanded judgment against the defendants for the proceeds of said matte.

That issues were joined upon said complaint in which Greene and others denied that the Cobre Grande Copper Company was the owner or lawfully entitled to said mining ground; that Greene and the parties claiming under him, had extracted ores from said ground, manufactured the same into matte, and shipped the same to El Paso rightfully, and that same was the property of defendant Greene and the parties claiming under him, to wit, the Consolidated National Bank of Tucson, and that said bank was the owner of said matte.

That after full trial and argument, the case was submited, under instructions of the court, to a jury, and the issues found against the plaintiff and in favor of said Consolidated National Bank as assignee, and privy to the rights of said Greene.

That the said bank derived its title to said matte rightfully; that Greene had the right to extract ores and manufacture matte as against plaintiff; that said court rendered judgment against plaintiff and in favor of the Consolidated National Bank upon its cross appeal asking that judgment be rendered in its favor against the Smelting Company for the value of said matte in the sum of $9,000.00; that said court found that the Cobre Grande Copper Company had not performed its contract between Greene and Mitchell of the 29th of November, 1898, and assigned to it, and the supplemental contract set forth in the complaint herein; and also found that the Cobre Grande Copper Company had forfeited

all its rights under said contract and the supplemental contract set forth in paragraph 3 of said complaint, and that Greene had not wrongfully taken possession of said property, and that said Cobre Grande Copper Company had failed to perform the conditions of its contract to pay the purchase price for said mining ground as alleged by no fault of Greene, and pleads the same in bar against the Cobre Grande Copper Company and plaintiff as a stockholder.

Denies all the allegations of the amended complaint except as specifically admitted.

Admits that Gage was a director and president of the Cobre Grande Copper Company from November 14, 1899, up to April 3, 1901, at which time he resigned as president and director, and his resignation was accepted, and since that time he has not been connected with said corporation.

Admits that Adamson, Costello, Wood and O'Keefe were directors of the Cobre Grande Copper Company from November 27, 1900, until April 3, 1901, at which time they resigned as directors, and their successors were elected and qualified. Alleged that about the month of November, 1898, and prior thereto, Greene owned certain properties in Sonora, Mexico, and had options to purchase other property there; that in November, 1898, Greene executed an option on the property then owned by him in Sonora and other property for which he had contracts to purchase to defendant Mitchell; that said contract provided that Mitchell should pay in cash at the execution of said contract $12,500.00 and $237,500.00 as follows:

$37,500.00 to be paid on or before November 26, 1899; $100,000.00 to be paid on or before November 26, 1900; $100,000.00 to be paid on or before November 26, 1901.

That afterwards, about the month of April, 1899, Greene and Mitchell, with the assistance of other parties, organized the Cobre Grande Copper Company under the laws of Arizona. The stock of the Company 200,000 shares of the par value of $2.50 each, was turned over to Mitchell in consideration of his contract with Greene, which contract between Greene and Mitchell was assigned to the Cobre Grande Copper Company subject to the rights of Greene therein. That thereupon the Cobre Grande Copper Company entered into and upon said property and began to operate the same.

That about the month of October, 1899, controversies arose between the Cobre Grande Copper Company and Greene over said contract and the right of possession of said mining property, and that about that time Greene entered into possession of said property. Thereupon the Cobre Grande Copper Company instituted a suit in the courts of Mexico to regain possession of said property, and also in the District Court of Maricopa County, Arizona, to restrain the delivery to the said Greene of the deeds which were put in escrow under said contract with Mitchell and thereafter assigned to the Cobre Grande Copper Company. That under the [illegible] named suit a temporary injunction was granted restraining said bank, as escrow agent of the parties, from delivering the escrow papers, and restraining Greene from demanding same from said bank.

That while said litigation was in progress, the Cobre Grande Copper Company was greatly embarrassed for funds to carry on said litigation, and in order to protect themselves the stockholders of said Company, or a majority thereof, comprising stockholders to the extent of about 115,049 shares, entered into a pooling arrange-

negotiate another option for the sale of said stock to raise money to carry on the litigation and to pay the debts of the Cobre Grande Copper Company.

That plaintiff Hallenborg and John H. Costello opened negotiations with said Gage and undertook to procure an option from him for the purchase of said stock at $2.50 per share.

That Grant R. Bennett, representing himself to be an attorney of New York City, and armed with a power of attorney from Hallenborg, came to Phoenix and personally opened negotiations in behalf of Hallenborg to procure an option to purchase the stock then held in pool by Gage. That Costello was personally present during this time, which occurred about the month of October, 1900. That various contracts were drawn and submitted for the consideration of the parties trying to effect a deal. And these defendants submitted to the court a form of contract which was drawn agreeable to and in conformity with the views and agreement as expressed by plaintiff through his attorney Grant R. Bennett.

This form of contract is shown in this record as Defendants' Exhibit Pooling Contract, unexecuted, page 144. That same was consented to by Hallenborg and his attorney Bennett, but objections were raised thereto by Costello, and Hallenborg being unable to or not desirous of entering into this contract alone and without Costello, for that reason the same was not signed.

Various other contracts were suggested and drawn of like tenor, all of which were consented to by the Cobre Grande Copper Company and Hallenborg, but were not satisfactory to Costello, and were rejected for that reason.

That these negotiations were kept up between plaintiff

and Costello on the one part, and Gage, Trustee, on the other, until about the first week in December, 1900, nothing resulting therefrom.

That the stockholders represented by Gage became restless and urged him to make the sale of said stock, and many of them were threatening to withdraw their stock from the pool and withdraw their power of attorney to Gage and sell their stock to Greene, unless Gage should negotiate with Greene at once.

That Gage realizing that nothing further could be done through Hallenborg and Costello, opened negotiations with Greene to sell the stock, and that Greene offered to purchase same upon better terms than anybody else had ever offered. That Gage consulted the directors and a large majority of the stockholders of the Cobre Grande Copper Company, and they urged him to enter into a contract with Greene for the sale of the stock. That the stock represented by Gage participating in said contract, comprised the entire stock of the Cobre Grande Copper Company, except that owned by Greene and his associates, and about 6,500 shares owned by other parties.

Thereupon Gage took the matter up with Greene, and after careful and thorough consideration and full negotiations, did, on December 12, 1900, enter into the contract marked Exhibit "B" in plaintiff's application for injunction and receivership filed in this case, which is asked to be made a part of the answer.

That after said contract was made, the Board of Directors and the stockholders of the Cobre Grande Copper Company met and ratified said contract in its entirety, and accepted the terms thereof.

That immediately upon executing said contract Greene paid fifty cents a share for each of said shares

represented in said pool, including fifty cents for each share then owned by plaintiff.

That all the stockholders accepted the money so paid to Gage and ratified said contract, except plaintiff Hallenborg, who returned the money sent to him and declined to be bound by said contract; and exclusively, as defendants are informed and believe, on the ground of his failure to become a purchaser of the stock himself.

That this contract was entered into in good faith and for the best interests of the Cobre Grande Copper Company and its stockholders, and was so believed by said Gage.

That when the payment of $37,500.00 fell due on November 26, 1899, under the option contract between Greene and Mitchell, and which was thereafter assigned to the Cobre Grande Copper Company, said Cobre Grande Copper Company being without funds was unable to make said payment, and never did make the same nor any part of the payments thereafter falling due under said contract.

That defendant Greene entered into possession of the mining property mentioned in the complaint about October, 1899, and thereupon the Cobre Grande Copper Company instituted suit No. 3437 in the District Court of the 3d Judicial District of Arizona in Maricopa County.

That said suit was on April 15, 1901, decided adversely to plaintiff and in favor of defendants.

That the suits mentioned in the complaint as pending in the State of New York, are, as defendants are informed and believe, still pending.

That the other suits mentioned in the complaint were all dismissed prior to the institution of this action, or otherwise disposed of by final judgment, except the suit

pending in the Republic of Mexico, and as to that, defendants are not informed.

Defendants pray that plaintiff take nothing by his action, and that they be dismissed with their costs. (Tr. pages 24-32.)

Intervention of J. Edward Addicks.

On December 28, 1901, J. Edward Addicks filed his petition of intervention, in which he alleged in substance that he is the owner of 5,000 shares of the stock of the Cobre Grande Copper Company, and was such at the bringing of this action.

Alleges that he brings this suit on his own behalf, and on behalf of all other stockholders and creditors of the Cobre Grande Copper Company who desire to come in and contribute to the expense of the action.

Adopts the allegations of plaintiff's complaint and joins in his prayer for relief. (Tr., pages 33-35.)

Replication of Plaintiff Hallenborg.

May 13, 1902, plaintiff Hallenborg filed a replication to the amended answer of E. B. Gage and others.

Demurs on various grounds, and further replying, denies that the Court of the 3d Judicial District of Arizona in and for Maricopa County, made the findings alleged in the answer of said defendants. Denies that there was any finding by said Court that the Cobre Grande Copper Company had forfeited its rights under the contract between Greene and Mitchell and assigned to the Cobre Grande Copper Company; denies that the Court found that Greene had not wrongfully taken possession of the property, and denies that the Court found that the Cobre Grande Company had failed to perform

the conditions of its contract to pay the purchase price of said property.

Avers that it is true that said judgment has not been appealed from, and that no writ of error had been sued out because of the conduct of said Gage and the other defendants answering with him in executing the contract of December 12, 1900, wherein all of the rights of the Cobre Grande Copper Company had been surrendered to Greene and the Greene Consolidated Copper Company, its adversary in litigation, and the officers of the Cobre Grande Copper Company bartered away to said Greene in said contract, as shown by said contract of December 12, 1900, plaintiff and others in like estate were rendered powerless to take any appeal from said judgment or to sue out any writ of error thereon; therefore the original action in this cause was brought for the purpose of having a receiver appointed who might have the power to open up these proceedings for the protection of plaintiff's rights and those of others in like estate.

Denies that the Court in Texas made the findings alleged by defendants; but avers the fact to be, that the action there pending was a possessory action for certain matte claimed to have been taken from the Cobre Grande Copper Company mines, and claimed by the Cobre Grande Copper Company; that the same was tried before a jury and a verdict directed by the Court from which an appeal was taken to the Supreme Court of Texas, which appeal was dismissed by Greene and others in the name of the Cobre Grande Copper Company after the collusive contract of December 12, 1900, by virtue of which Greene obtained control of all the Cobre Grande Copper Company and its officers, and by power of which he became *dominus litis* on both sides of all the cases pending between the Cobre Grande Copper Company

and Greene and the Greene Consolidated Copper Company at the date of filing this action; and by virtue of said dismissal of plaintiff's rights through its trustee, the Cobre Grande Copper Company, were ignored, and the cause not permitted to be heard on appeal.

Admits that the actions pending in the 3d Judicial District of Arizona, and in Texas, and in Mexico, were pending when this action was commenced, wherein the Cobre Grande Copper Company was plaintiff, and Greene and others were defendants; but in connection therewith alleges, that while said causes were pending before said Courts in which judgments had been rendered, that Greene, the Greene Consolidated Copper Company and others acting with them in order to obtain control of both sides of the suit, entered into the contract of December 12, 1900, wherein it was agreed that on Greene obtaining control of the Cobre Grande Company's stock, said causes should be dismissed, and that the officers of the Cobre Grande Copper Company should resign and their places be filled by men of Greene's choosing, and that on and before the dismissal of said actions and judgments rendered therein, plaintiff brought this suit in this Court for the purpose of having a receiver appointed, and the accounting prayed for, the protection of the interests of the minority stockholders; that when said suit was brought Greene and others acting with him, and while said Greene was *dominus litis* on both sides of the actions pending, and by virtue thereof was controlling the litigation on both sides of said causes, they appeared in court, or directed the same to be done, and on their motion, the said litigation which had been instituted by the said Cobre Grande Copper Company against Greene, the Greene Consolidated Copper Company et al., was dismissed or judgment taken

therein at their instance, in which the rights of plaintiff and others in like estate as minority stockholders had no representative to speak for them in the premises, or call the court's attention to the violation of their rights, as was being done by said procedure and dismissal of said causes. Hence plaintiff insists that the same was a fraud upon his rights, a violation of the rules of equity, and an imposition upon the Court, and that therefore, these defendants should not be heard to plead said judgment, thus obtaining as a bar to plaintiff's right of action, because they were parties to the fraud and conspiracy set up in the contract of December 12, 1900.

For cross complaint and reply to new matter set up in defendants answer, plaintiff demurs to said answer for insufficiency, and says that it is true that suit No. 3437, on the docket of the 3d Judicial District in Phoenix, was pending at the time plaintiff's original action herein was filed, wherein the Cobre Grande Copper Company was plaintiff, and Greene et al., defendants, and that it is true that said cause was not determined by the Court; but in connection therewith plaintiff alleges, that while said cause was pending before said District Court, and while the same had been tried, in order to obtain control of both sides of the suit, Greene, the Greene Consolidated Copper Company et al., acting with him, entered into the contract of December 12, 1900, wherein it was agreed that Greene on obtaining control of the Cobre Grande Copper Company stock, the cause should be dismissed; and that notwithstanding said agreement to dismiss, and before the same was done, plaintiff brought suit in this court for the purpose of having a receiver appointed, and accounting prayed for, for the protection of the interests of the minority stockholders; and that when said suit was brought, said

Greene, and others acting with him, instead of dismissing said cause as they had agreed to do, went before the Court at Phoenix and there, while he was *dominus litis* on both sides of the case, that counsel for the Cobre Grande Copper Company and Gage acting with him, and upon their own united motion, judgment was rendered as pleaded by defendants in paragraph 5 of their answer, in which the rights of plaintiff and others in like estate were ignored and violated by the judgment rendered, at which time and place plaintiff and others in like estate as minority stockholders, had no representative, and no one to speak for them in the premises, or call the Court's attention to the violation of their rights, as was being done by said procedure, and insist that the same was a fraud upon plaintiff, and in violation of the rules of equity, and an imposition upon the Court; and, therefore, defendants should not be heard to plead said judgment in bar of plaintiff's right of action herein.

Denies that plaintiff was a party to the contract of December 12, 1900; denies that he ever aided in its execution or approved same or that he ever received any consideration therefor or authorized any person to ratify or approve same for him, or did any act to make himself a party thereto, nor did any minority stockholder now interested in the litigation; on the contrary, avers that he was in New York City while the same was going on and being executed; but that as soon as he learned of the execution of said contract, and that defendants then in litigation opposing the Cobre Grande Copper Company, in which plaintiff's interest was, had obtained a controlling interest in said Cobre Grande Copper Company; that is, when he learned that Greene had obtained 115,000 shares of the stock of said Company, and thereby obtained control of it, and of the liti-

gation, he then declined to become a party to said contract, or to endorse the action of Gage the trustee, and elected to try and protect his rights and save them from the threatened destruction of said contract by making a minority stockholder's action, as he has in this case, and has appealed to the Court for the purpose of seeing that the minority rights of the Cobre Grande Copper Company should be protected.

That he refused to take the small pittance offered by defendants in the then litigation and by Greene who sought to obtain control of same, that he might protect his rights in an independent action.

Denies that any repudiation of said contract, which he made on information of same being executed by Gage as trustee, and as President of the Cobre Grande Copper Company, and Greene as trustee and as President of the Greene Consolidated Copper Company, was a breach of said contract to the injury of Greene or others entering into it, but that same was done for no other reason than to protect his own rights in the Cobre Grande Copper Company; and that said contract itself authorized all who did not endorse the same, to withdraw all interests from the same.

Denies that he ever published far and wide, or at all, in the newspapers throughout the country, or caused the same to be done, the facts set up in his petition as alleged in plaintiff's complaint for intervention. Says it is not true that said actions heretofore brought were not brought in good faith for the purpose of enforcing rights. Says it is not true that his action and other actions brought, were for the purpose of "bearing" the stock of the Greene Consolidated Copper Company and the values thereof, in order that he might purchase same for a less price. Denies that said actions heretofore

brought, or that this action was brought for the purpose of publishing to the public throughout the country, to the knowledge of proposed purchasers of the stock of the Greene Consolidated Copper Company for the purpose of injuring said Company and the defendant Greene, but that this and all other actions heretofore brought, was for the purpose of protecting his rights and those of others in like estate, and to prevent them from being destroyed by the fraudulent conspiracies set up in his original complaint and for no other purpose. Denies that these actions have damaged Greene, the Greene Consolidated Copper Company, or any other person acting in concert with them, or with Greene.

Alleges that each and every action pending at the time this action was brought, was taken charge of and controlled by Greene, the Greene Consolidated Copper Company, and his coadjutors whom he controlled, all of which was because of the power given him by the contract of December 12, 1900, which placed in his hands a majority of the stock of the original Cobre Grande Copper Company. That said suits pending at the date of said contract, and at the date of this action, were controlled in the interest of Greene and the Greene Consolidated Copper Company, because by virtue of said contract of December 12, 1900, Greene became and made himself *dominus litis* on both sides of all the cases then pending, and that their termination in his interest was because of that control, in which plaintiff and others in like estate were not heard or represented, but ignored, and their rights sought to be destroyed; and unless a receiver can be had whereby these fraudulent schemes heretofore related and related in plaintiff's original complaint, and transactions and procedures may be opened up and the rights of minority stockholders pro-

ment whereby all of their stock, to wit, 115,049 shares, was delivered to Gage with the power to vote same at the annual meetings of the stockholders; that after said stock was pooled and while the pooling contract was in force, the stockholders therein represented granted to Gage who held said stock under said pooling contract, the right to dispose of same; and that afterwards on January 5, 1900, Gage as trustee entered into a contract with one Benjamin Orne for the sale of said stock at $2.50 per share, a copy of which contract is attached to the first amended answer herein marked Exhibit "2" and made part of this answer, shown in this record as Defendants' Exhibit "C" Pooling Contract June 5, 1900. (Tr., pages 137-139.)

That said Orne failed to carry out the terms of his option to purchase said stock; that the Cobre Grande Copper Company was without funds and involved in litigation, and for the purpose of carrying on said litigation, on March 30, 1900, Gage, trustee for said stock and with the power to dispose of same, entered into an agreement with L. H. Chalmers, agent, for the sale of 100,100 shares of the Cobre Grande Copper Company stock at $2.50 per share, which contract is attached to the first amended answer marked Exhibit "3" and shown in this record as Defendants' Exhibit "D" Pooling Contract March 30, 1900. (Tr., page 139.)

That in said contract Chalmers was acting as agent for Samuel Untermeyer of New York City, or in case said Untermeyer refused to carry out said option, then such responsible party or parties as might be named by James Shirley. As part of the consideration for this contract, Chalmers, as such agent, agreed to furnish the necessary money for carrying on the litigation. That said contract with Chalmers lapsed on account of his

failure and the failure of those whom he represented to furnish the money to carry on said litigation to purchase said stock.

That afterwards on June 2, 1900, Gage for the purpose of raising funds to carry on said litigation on behalf of said stockholders, entered into a second agreement with Chalmers as agent for the sale of 100,100 shares of the capital stock of said corporation, being the stock then in his hands as trustee aforesaid, and at the price of $250,250.00, and upon the terms and conditions named in said option, a copy of which said option is attached and made part of this answer shown in this record as Defendants' Exhibit Pooling Contract June 2, 1900. (Pages 139-142.)

That on the same day Chalmers made written declaration that he was acting as agent in said contract for William H. Dowe, of New York City, and his representatives; and on the same day said Dowe declared in writing that he was acting for and representing John H. Costello, Axel W. Hallenborg, Henry H. Adams, James Shirley and Senator William F. Deboe. That in consideration for this option said parties purchased about 16,000 shares of the stock of the Cobre Grande Company held by Gage as trustee, and paid therefor $2.50 per share.

That said contract was not complied with on the part of said Chalmers and those whom he represented as agent, but was forfeited and permitted to lapse by the parties whom said Chalmers was representing as agent, among them the said plaintiff Hallenborg.

That during all the time aforesaid the said litigation was in progress. Debts had accumulated against the Cobre Grande Copper Company and were continuing to accumulate. Thereupon the said Gage undertook to

Each note executed by the Cobre Grande Copper Company by Gage, president, and J. Henry Wood, Secretary, all bearing six per cent. interest from date. Some of said notes to the order of Hallenborg, and some to Benjamin Orne or James Shirley and assigned to A. W. Hallenborg; total amount $50,005.

Plaintiff then offered in evidence a copy of the pleadings in action 3437, Cobre Grande Copper Company against Greene and others in the 3d Judicial District of Maricopa County, Arizona, marked Plaintiff's Exhibit (Ex. 2) "C." (Trans., pages 93-104.)

Plaintiff then offered in evidence preliminary injunction in said actions, dated November 29, 1899, marked Plaintiff's Exhibit "D." (Trans., page 111.)

Plaintiff then offered in evidence the agreement of December 12, 1900, between Greene, the Greene Consolidated Copper Company by Greene, its President of the first part, and E. B. Gage, of Prescott, and the Cobre Grande Copper Company, by Gage its President, party of the second part, marked Plaintiff's Exhibit "3." (Trans., page 105.)

Also supplemental contract, same parties, dated December 14, 1900, marked Plaintiff's Exhibit "4." (Trans., page 108.)

Plaintiff then read depositions of *A. W. Hallenborg* filed May 13, 1902, substantially as follows:

My age, 34 years; residence, 107 East 60th Street, New York City. Am a stock broker and member of the firm of Armstrong, Shirmer & Co., doing business at 44 Broadway. Am a creditor of the Cobre Grande Copper Company and was so at the beginning of this action. At that time held notes of the Cobre Grande Company for about $40,000.00, being of the dates and amounts mentioned above. The first two of said notes were assigned

to me by Benjamin Orne for value. Am acquainted with his signature and his signature is endorsed on the back thereof. Since this suit was commenced I have become owner of two other notes of the Cobre Grande Copper Company, being the last two mentioned above. Am acquainted with the signature of Gage and James Shirley. Their signatures appear on the assignments respectively endorsed on said notes. The last two I procured from James Shirley. I took them in payment of money owing me by him. All of these notes are my own property, and are now due and unpaid. The circumstances under which I first became creditor of the Cobre Grande Company were, that in December, 1899, or January, 1900, Benjamin Orne, R. T. McCabe and myself loaned to the Company $40,000 for the purpose of assisting it in its affairs. Afterwards I advanced further moneys to said Company to assist it in the litigation it was carrying on for the recovery of its mines. The notes which I produce were given on account of these advances. For the $40,000 originally advanced, the Cobre Grande Company gave notes for a part, and for the rest turned over some notes it held which had been given to it by other persons. These latter notes, however, amount to only a few thousand dollars, and I believe have since been paid. The notes given by the Company on account of the $40,000 loan, were all made to Orne under an agreement between Orne, McCabe and myself. I am a stockholder of the Cobre Grande Company of upwards of 8,000 shares, and have been since July, 1900. The circumstances under which I became a stockholder were that at that time Gage held as trustee a large amount of stock constituting more than a majority of all the stock of the Company in trust for a large number of stockholders. I was told that some of the smaller stock-

holders wished to realize in their holdings, and that it would be advisable to buy out their stock, and under these circumstances I bought about 8,000 shares and paid for it $2.50 per share, the par value thereof. Have read and am acquainted with the contents of the complaint in this action. My knowledge of the agreement of December 12, 1900, is derived from a copy thereof sent me by Gage. As soon as I learned of the agreement, I employed Atwater & Cruikshank, of New York City, as my attorneys to take steps to prevent the carrying out of the agreement, and through them retained John J. Hawkins, of Prescott, Arizona, as my attorney, to be associated with them, and on their advice sent Mr. Hawkins a proxy of my stock with directions to appear at the stockholders' meeting, of which I had notice, and which had been called, to act on said agreement, and directed him to appear and oppose the agreement. I am informed that he did appear there and oppose the same, and that he also served written notice upon the officers of the Cobre Grande Copper Company warning them not to carry out the agreement. I also had the papers prepared in this suit and had the suit started in Arizona. I also made application to the District Court of the 3d Judicial District for leave to intervene in the suit of the Cobre Grande Copper Company against Greene. The petition to intervene was denied. I took an appeal from said order, which appeal is still pending and undetermined. I used every effort in my power to prevent the carrying out of this agreement, and have acted as promptly and expeditiously as I was able.

Cross-examined:

The consideration for the indebtedness of the Cobre Grande Copper Company to me was money loaned in advance. I purchased 8,000 shares of stock at $2.50

per share from E. B. Gage, and paid the money to him. Certificates were first issued in the name of William H. Dowe, trustee. Mr. Dowe was trustee for Mr. Costello and myself, and afterwards transferred the shares to us according to our interest. At the time I purchased the stock I knew there was a controversy between the Cobre Grande Company and Greene, and that the controversy was in litigation, and I presume I knew that Greene claimed the Cobre Grande Company had forfeited its rights to the mining ground mentioned in its contract with Mitchell. Did not know the particulars as to the Elisa mine, which I understood was bought by the Cobre Grande Company from Greene and payment made in notes not yet due. I did understand in a general way that Greene and his associates had seized all the property of the Cobre Grande Copper Company, and that the Company was endeavoring to regain possession. I loaned the money to the Cobre Grande Copper Company to aid it in its litigation. I was not a volunteer in that litigation because I was applied to by the stockholders of the Cobre Grande Company for assistance. Did not stir up the litigation nor have anything to do with it until after it was commenced and in progress. Did not stimulate the litigation except by advancing money and interesting myself in its progress. Loaned money to the corporation with the expectation of acquiring an interest in the property. Was interested in an option for the purchase of shares of stock in the Company. Hoped and expected in case I purchased this stock under the option to make a profit on it in case I desired to sell. My intention, in case I purchased stock was to hold it as an investment and retain my interest therein. There would have been no object in my loaning to the Company unless I expected to be intersted in the property.

Never visited the mines in controversy; have no knowledge of them based on personal inspection. At the time I first advanced money to the Cobre Grande Company, I became interested in the option for the purchase of shares of stock in that Company, and intended to exercise the same when the Company regained possession of its mines. The $40,000 first advanced was to be used as far as necessary to pay off any installment of the purchase price of the mines which the court might determine to be due. It was the understanding when this advance was made, that $37,500 of the money should be used to pay an installment of the purchase price of the mines at such times as the court should decide it was payable. Did not know there were debts of the Cobre Grande Copper Company which were liens upon the mining ground. At the time I made my first advance to the Company, defendant Greene had been for sometime in possession of the mines. Heard rumors of indebtedness being incurred in running the mines, but as far as I knew they were indebtedness incurred by Greene. Did not embark in said litigation and put up my money as a volunteer for the purpose of stimulating and aiding the litigation, and without any intention of aiding the Cobre Grande Copper Company in paying its debts and meeting its obligations as stated in the contract of purchase between Mitchell and Greene, and the supplemental contract between Cobre Grande Copper Company and Greene for the purchase of said mining ground. I know of the organization known as the Sonora Copper Company. It was organized under the laws of Delaware in April, 1900, as a mining and manufacturing corporation. It was not organized for the purpose of becoming owner of stock in the Cobre Grande Copper Company in order that it might pursue its liti-

gation with Greene and his successors and assigns, and to carry on the controversy without putting up any money or aiding the Cobre Grande Copper Company in complying with its contracts of purchase and procuring the purchase price to be paid the Cobre Grande Copper Company, and to pay off the debts of said Company which were a line upon its ground.

Grant R. Bennett was acting as my attorney about December 12, 1900, for the purpose of protecting my interest in an option for the purchase of stock in the Cobre Grande Company. I understand he was in Phoenix on December 12, 1900. Was in telegraphic communication with him between December 1 and 15, 1900. Have not with me copies of telegrams or letters to or from him during that time, and am advised cannot be compelled to produce them. He was acting as attorney and counsel for me and the communications between us were confidential. I have been informed by Bennett that he was present in Phoenix during the trial of the case of the Cobre Grande Copper Company against Greene and others, and that he had knowledge of the proceedings. At that time he was acting as my personal attorney watching the trial in my interest. I was not a party to the suit but interested in it. I believe I received telegrams from him during the progress of and after the conclusion of the trial, but these telegrams were personal and confidential communications by him to me as attorney to client. I presume I have them now, but am advised that they are privileged, and on that ground decline to produce them. Have none of them with me at present, but presume they are at my house or office. I have never placed my stock in the Cobre Grande Copper Company in the hands of Gage with authority to him to dispose of the same on any terms whatever. Mr.

Gage never had any authority to sell my stock; he never claimed any. I never attempted to revoke any pretended authority to Mr. Gage to sell my stock. As far as I know Mr. Gage never undertook or assumed to sell any of my stock.

Prior to December 12, 1900, I was interested in an option for the purchase of stock of the Cobre Grande Copper Company, or so much of it as was held by E. B. Gage as trustee. The option was at $2.50 a share and extended until ninety days after the Cobre Grande Company got possession of its mines. I didn't take up said option because the Cobre Grande Copper Company had not regained possession of its property. Have not the written option with me. It was not in my name, and I don't think I ever had the original. It was partly in writing and partly oral.

On December 12, 1900, I was at the City of New York. I understand the contract of December 12, 1900, was negotiated and executed in Phoenix, Arizona. I have already stated how I endeavored to prevent the carrying out of that contract. There were letters and telegrams between myself and my attorney, but I do not produce copies of them because they are privileged as I am advised. I have none of such letters or telegrams or copies with me at the present time. I may have written or telegraphed to defendant Gage on the subject.

In November and December, 1900, I was having negotiations in relation to an option on the stock of the Cobre Grande Copper Company held by Gage as trustee. The negotiations were in relation to making changes in an option I already had. Have not with me any letters or telegrams relating to same. Most of them are between my attorney Bennett and myself and were confidential communications. I cannot recollect all the

terms offered or proposed. The final result was that nothing was agreed on. Am at present a stock broker, been engaged in the business sixteen years. I was drawn into the Cobre Grande Copper Company controversy this way: A representative of a majority of the stockholders came to me and stated that the Company needed to raise money to pay its current expenses and to make payment on the purchase price of its mines, and that the person who advanced the money could have an option on the majority of the stock of the Company at $2.50 a share. It was represented to me at the same time, the controversy would be short; that the Company would soon be in possession of its mines; that they were valuable; and that the stock of the Company would be a good investment. With Orne and McCabe I agreed to advance $40,000, of which $37,500, was to be used to pay an installment on the purchase price of the mine whenever necessary to pay it. The balance of $2,500 to be used for current expenses of the Company. At this time it was represented to me that the litigation was practically over. My idea was that by advancing this money I would get stock in the mining corporation which would be a good investment.

Speculations in legal controversies are not usual in the course of business in the line in which I am engaged, and, as far as I know, they are very unusual. Never was concerned in one before; never intended to engage in a speculation in a legal controversy; thought I was getting a good investment in mining property. (Trans., R., pp. 61-64.)

Anderson T. Herd, witness for plaintiff, testified by deposition, substantially as follows:

Age, twenty-nine; residence, 383 Central Park, West New York City; occupation, lawyer. Have read the complaint, and am acquainted with its contents.

In December, 1899, was practicing law in New York City in connection with Dowe and Hartridge. At that time was consulted by Hallenborg, Shirley, Orne and McCabe in regard to their interest in the Cobre Grande Copper Company, and as a result went to Arizona to look into the litigation for them. After making a full investigation, found that the Cobre Grande Copper Company was involved with Greene and others in the following litigations:

1. Suit in the 3d Judicial District of Arizona against Greene and Mitchell and the Pheonix National Bank for an injunction against each of defendants restraining them from taking the deeds that were in escrow with the Phoenix National Bank and turning them over to Greene.

2. A *quo warranto* proceeding by the Attorney General on the relation of some of the officers of the Cobre Grande Copper Company to determine who the proper officers of the Company were, and also asking for an injunction in the same procedings against Greene and his associates from acting as officers and from holding themselves out as such.

3. Found that there had been an injunction suit with relation to a certain meeting held at Bisbee, Arizona, which sought to restrain Greene and his associates from holding a special meeting of the directors of the Company for the purpose of ousting the then officers of the Company and electing Greene and his associates officers thereof.

4. Suit for a receiver of the Cobre Grande Copper Company had been instituted by one Isabella Chase, and was pending at the time I was there.

5. Went from Phoenix to Mexico and found a suit pending there in the District Court at Arispe, Sonora,

in behalf of the Company to recover its property from Greene.

6. In addition to this and growing out of this litigation, a writ of amparo was pending in the Federal Court at Nogales, Sonora.

While I was in Phoenix was employed by the Cobre Grande Copper Company to act as one of its attorneys, and I insisted that the first thing to be done would be to go to Mexico and consult Louis Mendez or some other attorney of equal standing, and follow his advice in regard to the Mexican litigation. This was agreed to and Mr. Chalmers and I went to the City of Mexico for this purpose.

While on that trip we instituted proceedings to recover matte in El Paso, Texas, through attorneys there. By telegraph I instructed Dowe & Hartridge to institute proceedings to recover certain matte that had been shipped to New York by Greene or some of his companies. The nature of these matte suits is as follows: The Cobre Grande Copper Company claimed the sole right to take ores from the mines of which Greene was in possession. Greene or some of his companies deriving their rights from him had extracted ores from the mines and smelted it into matte and shipped the matte to various places, and the Cobre Grande Copper Company where it found it is matte, claimed title to it, and brought actions in the nature of replevin to recover it. Some of such suits were brought at El Paso, some in the City of New York. I continued acting as attorney for the Company to December 12, 1900, and at that time the matte suits were still pending. The suit in the 3d District Court of Arizona by the Cobre Grande Company against Greene, Mitchell and the Phoenix National Bank, and the *quo warranto* proceedings, and the pro-

tected, the plaintiff's rights and those of others in like estate, will have been destroyed without any fault on their part, without their consent or authority or any negligence on their part, because they have always, since the action of Greene and Gage in the contract of December 12, 1900, been seeking for redress and protection of their rights so violated by said contract. (Trans., pp. 35-43.)

THE EVIDENCE.

The cause came on for trial on May 12, 1902, and was continued from day to day until finally decided.

Plaintiff introduced in evidence the stock of the Cobre Grande Copper Company issued to A. W. Hallenborg.

J. Henry Woods sworn and testified on behalf of plaintiff as follows:

I was familiar with the stock books of the Cobre Grande Copper Company up to the time I resigned the secretaryship in April, 1901. At that time J. Edward Addicks was a stockholder to the amount of 5,000 shares. Hallenborg's stock was regularly issued to him. In July, 1899, when I became connected with the Cobre Grande Copper Company, the stockholders were William C. Greene, George Mitchell, Geo. A. Treadwell, J. D. Dort and O. W. Saxhang. In September, 1899, the directors were Greene, Mitchell, Treadwell, Costello and J. Henry Wood. Costello was President, I, Secretary and Treasurer. On November 14, 1899, E. B. Gage was elected President, and the directors were Gage, Wood, Adamson and O'Keefe. Costello became director November, 1900. The capital stock of the Cobre Grande Copper Company consisted of 200,000 shares at $2.50 each, making $500,000. In September, 1899, the Cobre Grande Copper Company was in possession of some nine-

teen or twenty mining claims in the Cananea mountains, a smelter, store building, general camp equipment for running the mines and everything pertaining to the running of a camp of that kind. The mines were being operated by the Cobre Grande Copper Company and were upwards of $1,000,000 in value. About October 11, 1899, the Cobre Grande Copper Company lost possession of the property, and Greene obtained possession. The Cobre Grande Copper Company never has been possessed of that property since. In consequence of that change, a controversy arose between the Company and Greene, suits were instituted by the Cobre Grande Copper Company in the fall of 1899. One of these was commenced at Phoenix by the Cobre Grande Company against Greene and others. On April 3, 1901, there was a meeting of the Board of Directors, five directors resigned, to wit, Gage, Costello, Adamson and O'Keefe and myself. In place of those resigning there was elected Greene, W. H. Barnes, Jerry Millay, L. H. Chalmers, and I think Frank Cox. Barnes is a lawyer and had been counsel for Greene for sometime, and had represented him in the litigation with the Cobre Grande Copper Company. Chalmers is an attorney in Phoenix, and up to that time had been representing the Cobre Grande Copper Company. Millay and Cox were each lawyers and both had been counsel for Greene. On April 3, 1901, Greene was made President, Barnes Treasurer and Alfred Franklin Secretary. The change in management was made to carry out the terms of the contract of December 12, 1900.

Plaintiff here introduced in evidence copy of the minutes of the meeting of the Cobre Grande Copper Company held November 14, 1899, pursuant to call of October 31, 1899; also minutes of the Board of Directors of

November 15, 1899, relative to the election of officers, designated as Plaintiff's Exhibit 1, Transcript, pages 91-92.

Witness continues: In addition to the property in the Cananeas transferred to Greene, the Cobre Grande Company had office furniture in Phoenix and some matte; they had matte en route to the smelter, or at the smelter at that time. Don't know what become of it ultimately. It was placed under attachment, some law proceeding. I think the value must have been some ten or twelve thousand dollars. I refer to the matte which went to El Paso, Texas, which was the subject of the litigation there. The office furniture was turned over to Judge Barnes after the election of new officers in April, 1901. It was worth $150 or $200. With that exception, the Cobre Grande had no assets outside of the property that Greene got possession of. The Cobre Grande Company is not solvent at present. At the time I severed my connection with it, we were paying debts all along up to the time Greene took possession. There were no debts presented to be paid right after that. It was not in possession of assets to meet the claim of Hallenborg; it had no money. I do not know how much money they had after October 14, 1899. At the time my connection with the Company ceased, there were practically no funds on hand.

Cross-examined:

The stockholders of the Cobre Grande Copper Company ratified the contract of December 12, 1900, by a very large majority. Sometime prior to November 14, 1899, there had been two sets of officers claiming to be directors of the Cobre Grande Company, and a suit had been pending to try the question which of the two sets constituted the legal Board of Directors. After Novem-

ber 14, 1899, my recollection is, that the action of the Board then elected was not questioned. At that election the stock voted amounted to 113,340 shares, which was substantially held in trust by Gage. At that time I thought the mining property in question was worth about $50,000,000, because of the ore body in existence there. We had been working it about three months at a profit. I never worked a copper property before. As Secretary and former Treasurer, I did not know of any funds. Mr. Dort turned over to me something like $11,000 I think. My salary was paid clear down to and including October, 1900. I don't know of debts of this Company that were presented up to the time I ceased to be Secretary which were not paid.

Re-direct examination:

The $11,000 was turned over to me in July, 1899. It was used for the operations of the Company—running expenses. I ceased to be Treasurer in November, 1900. At that time there was only a few hundred dollars on hand. I remained Secretary up to April 1; don't know the amount then on hand. Mr. E. B. Knox succeeded me as Treasurer. Gage resigned in April, 1901. I was re-elected Secretary in April and acted as such for a few weeks, possibly five or six. (Trans., 58-60.)

Plaintiff then offered in evidence eight promissory notes of the Cobre Grande Copper Company as follows:

Note $12,000 dated January 19, 1900.
Note $14,175, dated March 6, 1900.
Note $6,000, dated May 1, 1900.
Note $4,000, dated May 23, 1900.
Note $1,905.25, dated June 29, 1900.
Note $1,000, dated August 18, 1900.
Note $4,283, dated March 15, 1900.
Note $7,042, dated May 1, 1900.

attorney now and have not had it since I left Phoenix the last time. It was revoked in writing by telegram by Hallenborg. Received the telegram of revocation I think December 15. At once advised Mr. Gage personally of the revocation; also Mr. Chalmers. I think my recollection is that Mr. Gage advised me that he had received a similar telegram. Was introduced to Hallenborg by Dowe. Understood that Dowe at the time I was in Phoenix during October and a portion of November was attorney and representative of Hallenborg in New York. Wrote a number of letters to Dowe, copies of which are not accessible to me. Don't remember what telegrams I received from Dowe during my first visit to Phoenix, but all telegrams received from me by him or sent by me to him were when we both represented Hallenborg as attorneys. During the time I was in Phoenix consulted with Mr. Gage and Mr. Chalmers very freely and advised with Mr. Costello and his attorney Mr. Herndon. Was not consulted with reference to negotiations leading up to contract between Gage and Greene of December 12. Prior to its execution knew absolutely nothing of its terms except in a general way what I might have learned from Mr. Gage on the Monday before it was executed, when he informed me in substance that he thought he would have to dispose of the holdings to the Greene crowd. He did not tell me that time or any time prior to the execution of the contract, what the terms thereof were or were to be; nor was I asked or evidently expected to be present at any of the conferences or consultations prior to the drafting of that contract, or present at the time it was executed, and unless I am mistaken, was not given a copy of the contract until twelve or twenty-four hours after it had been executed. Think it was

the day after the contract was signed that a copy was given to me by Mr. Gage or Mr. Chalmers, and immediately upon receipt of same I advised Hallenborg of its terms.

During the negotiations and up to the time of the execution of the contract giving Greene control of the Cobre Grande Company, I did not consult with the attorneys or Gage about the contract. Did not approve of same; did not suggest changes and alterations in the proposed contract; did not know of the terms suggested for said contract, and of course no suggestions of mine were incorporated therein, nor did I approve of it after it was drawn. But after it was made and executed, which by its terms seemed to vest a control of the majority of the shares of the Cobre Grande Copper Company in Greene and his associates, it seemed to me that Hallenborg's shares, constituting but a small minority, would be rendered valueless by the conduct of the Company by those in whom the control was vested. I therefore believed it was a wise business proposition for Hallenborg to accept the terms of the contract, take the best money he could get out of it, and so advised him. In other words, I deemed it best for Hallenborg to make the best of what seemed to me a bad condition.

During these negotiations I did not have any conversation with Mr. Barnes concerning the contract. After the negotiations were concluded and the contract executed, I may have said to Mr. Barnes in substance that I believed under the circumstances it might be best for Hallenborg to accept under the terms of the contract and take his money, but I did not state that I approved of the contract and accepted it, and I stated explicitly to every one to whom I spoke, that Mr. Hallen-

borg was opposed to said contract, was determined to resist it, and had not authorized me to accept it. I may have said to Mr. Barnes that I would advise Hallenborg to accept that contract, and as a matter of fact did advise him, but I did not state that I had no doubt he would do so. I did not in substance say the same thing on any occasion in Phoenix to Greene. I did not give Greene or Barnes to understand that the settlement culminating in the contract, met with my approval or that Hallenborg would accept same. I may have said that I thought it might be best for him to accept. (Trans., pages 70-73.)

Plaintiff then offered in evidence Articles of Incorporation of the Cobre Grande Copper Company, dated April 22, 1899, marked Plaintiff's Exhibit Articles. (Trans., page 109.)

Plaintiff then offered in evidence minutes of the meeting of the Directors of the Cobre Grande Copper Company held December 13, 1900, containing motion and resolution ratifying agreement of December 12, 1900. (Trans., page 73.)

Plaintiff then offered in evidence letters from E. B. Gage, trustee, to Axel W. Hallenborg, dated December 17, 1900, marked Plaintiff's Exhibit "7." (Trans., page 110.)

Then the letter of Axel W. Hallenborg to E. B. Gage, dated December 24, 1900, marked Plaintiff's Exhibit "8." (Trans., page 110); and rested.

Defendants then offered in evidence the judgment roll in the case of the Cobre Grande Copper Company vs. William C. Greene et al., No. 3437, in the District Court of the Third Judicial District of Arizona for Maricopa County, marked Defendants Exhibit Judgment Roll. (Trans., page 111.)

Defendants offered in evidence the judgment roll in the action in the Thirty-fourth Judicial District of the State of Texas between the Cobre Grande Copper Company and the Kansas City Smelting and Refining Company et al., No. 3211, marked Defendants Exhibit Texas Judgement Roll. (Trans., page 118.)

Defendants offered in evidence contract or power of attorney to E. B. Gage, dated October 24, 1900, marked Defendants' Exhibit Authorization, Trans., page 136.

E. B. Gage, witness for defendants, sworn, testified, in substance, as follows:

The paper shown to me is the power of attorney handed me by Mr. Grant R. Bennett.

Defendants offer in evidence power of attorney from Axel W. Hallenborg to Grant R. Bennett, dated October 13, 1900, marked Defendants' Exhibit Bennett Power. (Trans., page 137.)

Witness says: I am one of the defendants; don't know plaintiff Hallenborg; never saw him. When the advance of $40,000 was made, there was no understanding that $37,500 of the money should be used to pay an installment of the purchase price of the mines at such times as the Court should decide it was payable. I know of no such understanding. The only written instrument I had showing the status of Hallenborg's stock, was the power of attorney signed Grant R. Bennett, Hallenborg's attorney.

Hallenborg notified me on December 15 by telegram that he revoked Bennet's power of attorney. Don't recollect that I had any correspondence with Hallenborg direct about the pooling contract.

Telegram offered in evidence by defendants as follows:

"New York, New York, Dec. 15.

"E. B. Gage,

"Prescott, A. T.

"I have revoked power of attorney given Grant R. Bennett. (Signed) A. W. Hallenborg."

I was director and president of the Cobre Grande Company at one time. My resignation was acted upon April 3, 1901. I resigned both as director and president, and my resignation was accepted. Since that time have not had any official connection with the Company. Know Costello, Adamson, Wood and O'Keefe; they were also directors and resigned at the same time I did and had no connection with the Company since to my knowledge.

Under the pooling contract, already in evidence, 115,000 shares or thereabouts passed into my hands as trustee. I had the stock in my hands. Met Benjamin Orne once. Had no negotiations with him directly in regard to the matter, but Mr. Herd came out there with a power of attorney from Mr. Orne, I think in January, 1900. An option was given to Orne for the purchase of approximately the same stock. Agreement of January 5, 1900, between Gage, trustee, and Orne shown witness and identified as genuine, and offered in evidence by defendants' counsel, marked Defendants' Exhibit "C" Pooling Contract January 5, 1900. (Trans., pp. 137-8.)

They did not take up the stock under that contract.

Agreement of March 30, 1900, between Gage and Chalmers, shown witness and identified as genuine and offered in evidence by defendants' counsel, marked Defendant's Exhibit "D" Pooling Contract, March 30, 1900. (Trans., p. 139.)

At that time, March 30, 1900, the Cobre Grande Cop-

per Company was in litigation. We needed money to carry on expenses of the litigation. We did not have it. The purpose of that contract with Chalmers was to provide money for that purpose, to conduct the litigation against Greene and the other defendants. They did not take up the stock under that option and it lapsed on account of their failure to comply with the terms.

Witness shown contract dated June 2, 1900, between Gage and Chalmers. This contract was entered into. Marked Pooling Contract, June 2, 1900. (Trans., pp. 139-142.)

There were about 16,000 shares purchased by Hallenborg and Costello under that option as I recollect. The purpose of that contract was to provide money to carry on the litigation. Hallenborg and Costello purchased these shares at that time from some of the stockholders who were restless and dissatisfied. That was a part of the 115,000 shares in my hands under the pooling arrangement we had at that time.

Defendants offer in evidence telegram from Gage to Dort, dated May 31, 1900; telegram Dowe and others to Gage, dated June 1, 1900; telegram Costello to Dort, dated June 1, 1900; also letter from Dowe to Chalmers, dated June 2, 1900; letter from Chalmers to Dowe, dated June 2, 1900. Marked Defendants' Exhibit "E." Telegrams. (Trans., pp. 143-4.)

That agreement also lapsed. It was under that option that the 16,000 shares of the stock that I spoke of was sold to Hallenborg and Costello. The litigation was still going on. The indebtedness of the Company had been increasing. Grant R. Bennett came out to Phoenix and sought to obtain another option, as I understood, for Hallenborg, Costello and others. He then had the power of attorney from Hallenborg to Bennett, already

in evidence. Costello was there in person. There were several contracts discussed and drawn up, but never consummated or signed. Bennett was satisfied with one or two of them, but Costello was not, and failed to sign. These negotiations continued up to the middle of November. Bennett then went east and requested me to hold the matter, if I possibly could, until he could get a consultation with his principal, who would probably return to the Territory with him, and I told him that I would use my best efforts to hold the stock together until he could return. He promised to return about December 1; he returned about December 3, I think, and stated that Hallenborg would follow in a day or two and no action was taken, simply waiting for Hallenborg to appear, and a few days later, between that and the 12th, he notified me that Hallenborg was not coming. I was holding it off because I desired to give Hallenborg an option in preference to anybody else if he desired it. Held off at his suggestion as long as I could. I held the stock under the pooling arrangement up to December 1 and then that expired and gave the people an opportunity who were in the pooling contract to withdraw their stock. Greene's agents were very active in the purchase of outside stock and were making offers to the owners of the pooling stock.

After December 1 they were threatening to revoke their power of attorney, and sell their stock for whatever they could, at the price they could get. There were brokers Orr & Jones buying the stock, they were going to everybody they knew to be owners. I was informed they were buying for Greene and Logan, Greene's attorneys in New York. Told Bennett and Costello that I could not hold these parties together any longer unless they would do something and the situation seemed to be

a desperate one to me. I was informed by my attorney for the Cobre Grande Copper Company, whom I consulted, there was no hope of winning the case of the Cobre Grande Copper Company, the suit tried sometime in October. Asked legal advice. It seemed to me that they would obtain control of the stock of the Company, then if the Judge went against us, the assets of the Company would be practically wiped out. That as a business proposition it was advisable to compromise the case if it could be done. Was informed that the Mexican suit had gone against us; it barred our further proceeding there unless a new suit was brought. I have referred to the suit brought by the Cobre Grande Copper Company against Greene to enjoin the delivery to Greene of the papers deposited in escrow in the Phoenix National Bank.

Had an interview with Greene and his attorney; Judge Herndon and myself on one side, Greene and his attorney on the other. Prior to that I consulted Costello and all the directors, and Costello and Grant R. Bennett were familiar with my views on the matter. The stockholders as far as they were accessible, were fully informed at all times. They advised a comprise and there was no concealment from anybody. All the directors were present when the contract of December 12 was drawn up, and advised it. Bennett was in Phoenix at that time and informed by me what the situation was and what my views were. Don't recollect just what passed between us. Don't recollect that he made any objection to it. As soon as a legal meeting could be held, after the contract of December 12, there was a meeting of the Board of Directors, don't recollect date, they confirmed my action in executing the contract, and afterwards there was a meeting of the stockholders called for

the purpose to confirm the action of the Board of Directors, which was done. I made the first payment of fifty cents per share immediately. It was not accepted by Hallenborg; the other stockholders accepted it. In making the agreement of December 12, 1900, I deemed my action for the best interest of the Cobre Grande Copper Company and all stockholders. There was a payment of $37,500 which fell due on November 26, 1899, under the original contract between Greene and Mitchell which was assigned to the Cobre Grande Copper Company.

Referring to agreement of December 12, 1900, the $25,000 mentioned therein was to pay a note of the Cobre Grande Copper Company which was given for stock which was contributed by different stockholders to the extent of $25,000 to Sandoval & Co. The two amounts of $30,000 mentioned in the contract, was $30,000 in cash and 3,000 shares of stock which they had the privilege of paying in cash for the stock instead of delivering it, making $60,000, was to apply on the notes and debts of the Cobre Grande Copper Company outside of the $25,000. The notes outstanding, so far as we could judge at that time, were approximately, $60,000, including interest, as I understand it. I did not know what the floating indebtedness would be. The notes given to New York parties was the indebtedness discussed and provided for by this $60,000. I did not know at that time what notes Hallenborg held. This was for money that was advanced by New York parties; that was the intention. Hallenborg claimed a portion of it, not all of it. I had provided for all that I could that I could get from Greene. Mr. Herndon said that he thought my salary and expenses should be provided for and Greene voluntarily allowed 5,000 shares of stock for that purpose. The 5,000 shares mentioned there for the use and

benefit of Chalmers, Baker and Bennett, and Herndon & Norris, was for their services as attorneys in the Cobre Grande case. I don't know how many suits were pending. It was for their services in all these matters. There was an understanding in the meeting that if the notes that were held in New York were not presented, that I should turn that $60,000 over to the Treasurer of the Cobre Grande Copper Company, and I did so, and got a receipt from the Company for that amount, which I produce.

Receipt read in evidence, April 3, 1901. (Trans., page 79, Fols. 119-120.)

The unsigned agreement dated November, 1900, shown witness.

He says, I don't say that I can positively identify that paper; it was similar to the one submitted to me, but there is nothing by which I can identify it. The one submitted to me was the same in substance and form marked Defendants' X Pooling Contract unexecuted. (Trans. of Rec., page 144.)

I think I opened the negotiations which led up to the contract of December 12; made the best terms I could. Negotiations were continued a day or two. I represented to Mr. Greene that the lawyers were claiming $50,000 for their services and wanted him to pay that. I suppose that was a debt due them for their services. They had rendered services and it was hard to fix lawyers fees. They had not been paid. I think Greene said he would buy all the outstanding stock that would be offered at $2.50, the same price he paid me. I paid $60,000 to the Treasurer of the Cobre Grande Copper Company and paid another debt of the Company of $25,000. At that time I had paid out some money for the Cobre Grande Copper Company, quite a considerable amount; don't recollect how much.

ceedings in Mexico to regain possession of the property, were all still pending. My recollection is, that the action for receivership brought by Isabella Chase had been dismissed before December 12, 1900. In regard to the writ of Amparo in Mexico, which was taken by Greene in the Federal Court, I understand that prior to December 12, 1900, the Amparo proceedings had been heard by the Federal Court and the order or decree given by the District Court of Sonora, directing the return of the mines to the Cobre Grande Company, had been set aside on the ground of failure to give proper notice to Greene of the proceedings, and the proceedings had been remanded to the District Court with directions to be reheard upon proper notice to Greene.

Cross-examination:

Became attorney for the Cobre Grande Copper Company in the forepart of January, 1900. Said Company has never authorized me, as its attorney, to divulge or testify as to what I did for that Company as its attorney or as to information acquired by me as its attorney. In my answer to direct interrogatories I have not disclosed any confidential communications between myself and said Company; have only spoken of suits and proceedings which were matters of record, and most of which were commenced and of which I acquired knowledge before I became attorney for the Company. Have not volunteered to testify as against the Cobre Grande Company as to matters which came to my knowledge as such attorney; am being examined as a witness under a commission issued from the Arizona Court, and I have testified only as to such matters as to which I understand am compelled to testify. (Trans., Rec., pages 67-69.)

Plaintiff then read in evidence the promissory note

for $23,000 made by Costello of date December 16, 1899. (Trans., p. 69.)

It was admitted that said note was returned to Costello by the Cobre Grande Copper Company subsequent to December 12, 1900. (Trans., page 70.)

Plaintiff then read in evidence the depositions of *Grant R. Bennett*, witness for plaintiff, taken April 25, 1902, in substance as follows:

Age, thirty-eight; residence, New York City, occupation, lawyer. My knowledge of the agreement has been obtained by reading it after it was executed. I took no part in the conference with reference to it and which led up to its making. Was not present when signed or delivered nor at any of the meetings. Never in any way, by writing or verbally, gave my or the consent of Hallenborg whom I represented, to that contract, or my approval. The only conversation I had with any one immediately prior to the consummation of the contract was a general one with Mr. Gage, the purport of which was that unless our clients could buy all of this stock which was called Jerome stock, and which had been in the pooling agreement and previous option contract, that he apprehended that he would be compelled to make terms with Greene. Without stating accurately, my recollection is that my conversation with Gage was on Monday of the week in which the contract was executed. All that week at various times upon receipt of telegrams from Hallenborg I advised particularly with Mr. Gage, stating to him that Hallenborg would not consent to the contract and on the contrary desired to resist and prevent its consummation every way possible, and that he had so instructed me by telegram.

Was present in Phoenix, representing Hallenborg as attorney, for a period during the months of October,

November and December, 1900, except a short time when I was in New York. My principal purpose in going there was to obtain the contract for Hallenborg and his associates of a majority of the shares of the Cobre Grande Copper Company. Costello was personally present during much of the time. It is a fact that various forms and memoranda were drawn up, typewritten, and discussed looking to securing the option above mentioned, and some of them were in substantial accordance with my instructions from Hallenborg. Hallenborg did in response to my telegram, wire me his acceptance of a certain contract and placed in the Phoenix Bank his proportion of the money to be paid under the terms of such contract and which would give him and his associates control of a majority of such stock. There were various complications in getting the different parties together which delayed the execution of the contract until my return to New York, and when I came back to Phoenix I found that conditions had changed, and that it would require considerable more immediate cash to secure the contract than at first. Forms of other contracts were drawn. Their terms were generally acceptable to Mr. Gage, but were not ratified by the Cobre Grande Copper Company. I think their terms were generally acceptable to Hallenborg. Cannot swear whether these contracts were satisfactory to Costello or not, he was on the ground and represented by attorneys. It is a fact that these negotiations were kept up to the first week of December, 1900. Cannot say whether nothing resulted therefrom.

My presence in Arizona for Hallenborg was for the general purpose of getting control of the Cobre Grande Copper Company and a majority of shares of its stock in order to conduct the litigation and end it and make all the shares of stock profitable to the stockholders.

Have examined the pooling contract of November, 1900; am unable to state as a matter of law that Hallenborg and Costello were the persons interested therein. Don't know whether Chalmers was the agent for Hallenborg and Costello or not. Am very certain that Hallenborg was dissatisfied with the fact that Greene had apparently secured the management of the Cobre Grande Copper Company, because he expected thereby to lose all the money he had invested in the Company. Don't know the reason for the institution of these proceedings. This unexecuted contract of November, 1900, appears to be one of many of those forms of contract drawn by various persons or their attorneys for the purpose of vesting in Hallenborg and associates control of the Cobre Grande Copper Company. Am quite certain I did not draw this contract; don't remember its terms; can't state that they were satisfactory to Hallenborg, because I did not advise him of the terms of this contract. Don't know whether Costello objected to it or not. My recollection was that I was in Phoenix on the 22d of October, 1900; that I arrived there on the 19th of October and remained until about November 17. Was present during most of said trial. Believe a motion was made to admit me to practice in that Court. Did not take any active part in the trial. Did confer with the attorneys. So far as I acted in the trial, I represented plaintiff by courtesy of plaintiff's attorneys. Otherwise while at Phoenix I represented Mr. Hallenborg. I am the same Grant R. Bennett who signed the pooling contract placing 115,000 shares in the hands of Mr. Gage, and the signature of Hallenborg to that contract was signed by me. All the time I was in Phoenix until December 15, I was acting under a written power of attorney; have not that power of

That was the first vote for salary attached to the president's office.

Re-direct examination:

I didn't make any application for money to carry on these suits to the New York stockholders; they made the application; they furnished the money and instructed me to go on with the suits. (Tr. of Rec., pages 75 to 84.)

L. H. Chalmers, for defendant, testified, in substance, as follows:

I know Anderson T. Herd; he and I employed attorneys in El Paso to bring the suit there, the record of which has been introduced in evidence. He was representing Benjamin Orne, whose name appears with Hallenborg in some of these options. It was part of the consideration for the options to purchase stock that a debt of $40,000 that Hallenborg now claims was to be released. I went to New York with the object of raising money to carry on this litigation; did all I could. We would have sold the stock at $1.00 a share many times. The highest price I found it possible to sell the stock for was $2.50 a share. Hallenborg offered to take it at the same rate; take an option upon it. He and Costello bought 16,000 shares at that figure. There was no other bidder who offered to take it at $2.50 a share. Costello had an option in July at $2.50 and bought considerable of the stock at that time. I drew the Articles of Incorporation of the Cobre Grande Copper Company, and have been acquainted with it since its inception. Know the services rendered by the lawyers. Practically all the time of Herndon & Norris and myself, or a large portion of it, was taken up the latter part of 1898, 1899 and 1900 to the time the contract was made. We brought from ten to a dozen law

suits and oversaw the litigation in Mexico. I took frequent trips to the City of Mexico, to El Paso, to Nogales, Hermosillo and one to New York. I attended to all sorts of motions in these cases. We were overseeing the whole litigation in Arizona in several of its courts, in Maricopa and Cochise counties, also motions in Pima County, trouble in Nogales, transactions out of court. It took me nearly all my time for six or eight months to keep Mr. Wood out of jail alone, and overseeing the Mexican litigation, employing lawyers—my whole time was practically taken up. I practically abandoned my office from the latter part of 1898 until the settlement. The time of Baker & Bennett was more taken up in court matters. I would telegraph Baker & Bennett, or Herndon, to go here and there and sent them all over the country. Mr. Herndon is generally considered a good man. When this matter of compromise came up Mr. Gage spoke to me about it, and I told him that I had expected to get as much as $50,000 out of this litigation myself. We talked it over and concluded that we would hold out for $50,000 and try to collect it. That was an extremely reasonable compensation. I was not present at the time of the decision of Judge Street. At the time of the submission to him for decision, I was the attorney for the Phoenix National Bank, as well as for the Cobre Grande Copper Company. I approached Judge Barnes in regard to the submission of the case. I told him that the bank was enjoined from passing over the escrow papers; that Hallenborg had brought a suit in Prescott claiming that the contract of December 12 was fraudulent, and that there had been demands upon the bank for the papers by Greene and Mitchell and different parties, and we didn't know what to do with those papers, and I asked Judge Barnes if the case

ought not to be submitted and a decision rendered, and he agreed with me. Went into the court room at Phoenix and announced to the judge who was on the bench that the attorneys for both sides of the case desired that it be submitted. This is the last I heard of it until it was decided. Judge Barnes wasn't in court at that time. In making up my estimate for the services of myself and associate counsel, I took into consideration not only the time which was employed in attending to the litigation and outside matters, but the amount and questions involved and the value of the property. I recall that Edwards & Petticolas were attorneys in El Paso for the Company, and were paid by the Company.

Cross-examination:

It was after December 12, 1900, I went into court at Phoenix and asked that the case be decided. It was after Greene had become president of both parties and after the time the Directors of the Cobre Grande Company were elected friendly to him. Don't remember the date when the case was decided. My recollection is, that it was four or five days after it was submitted before the decision was rendered. The date of the decision was not law day—Saturday. Mr. Jamison was there when the case was submitted. The record shows that the decision was rendered on April 15, 1901. I have stated all that I know with reference to the submission of the case to Judge Street. Was present and took part in the trial between the Cobre Grande Copper Company and Greene and others in Phoenix in October, 1900. Mr. Jamison took a very active part in that trial—examined the witnesses. He and I were partners at that time. So far as my office was concerned, he took charge of the preparation of the trial, was quite familiar with the case,

was very sanguine of success, so was I. I believed the action well brought, so did the others. All the suits referred to were in relation to the controversy of the Cobre Grande Company in Sonora. The two parties were the Cobre Grande Copper Company on one side and Greene and Mitchell on the other. The controversies all arose over the struggle of the Cobre Grande Copper Company to regain possession of the property and the product of the mines, matte and so on. The amount involved in the suit in Maricopa County was absolutely nothing, it was merely the possession of the escrow papers. We thought the mine was of great value, and that the winning of that suit was a preliminary step to get a good standing in Mexico. We could take the deeds to Mexico and put them on record and bring our action there. Mr. Barnes was counsel for Greene and Mitchell, and I spoke to him about the submission five or six days before, say the 3d, 4th or 5th of April. Had no consultation with any one on the subject. Considered myself in absolute command of the Cobre Grande litigation. Did not state anything to Judge Street at that time. I think the cause had remained on submission before him all the time previous to that. The agreement of December 12 required the action be dismissed. That was not done, and I had no consultation with any one with reference to it. Judge Barnes prepared and sent the judgment over to me for my approval. I marked it approved according to the practice here. The judgment did'nt come into my hands until after the decision had been announced from the bench. Suppose it was filed the 15th of April. My recollection is he sent the judgment over to Tucson where his office is.

In the present action I appear of record for the Cobre Grande Copper Company and have taken part in the

trial and have resisted plaintiff's suit. Don't know who is president; think Scott White is Secretary. Have appeared here principally by direction of E. B. Gage to look after his interest. In doing so I have seen fit to appear for the Cobre Grande Copper Company. None of the defenses were put in at his request. It was Judge Barnes who asked me to appear for the Cobre Grande Copper Company in this case. At that time he was a director of the Company. We discussed the situation in Mr. Herndon's office the other day. Barnes is representing Greene on this trial and has been the leading counsel on his behalf. Don't know how much was paid by the Cobre Grande Copper Company to the different counsel during the litigations. I drew out sums of money and paid them out to counsel myself; have no doubt that $20,000 was paid, we had counsel all over the United States and Mexico. Think the Arizona counsel got somewhere between three and five thousand dollars. Drew some twelve or fifteen thousand dollars which was used for expenses of all kinds and attorneys fees in El Paso, New York, and different places. The action was brought and money disbursed under my advice and that of Herndon and Baker & Bennett. The litigation was directed from here by Wood and myself. The suits were brought in good faith, the money paid in good faith, and I think the suits were necessary.

Re-direct examination:

Mr. Herndon and Baker & Bennett were against the theory and policy of that litigation from the start. I fought them all the time continually. They thought the chances of winning were absolutely nil on account of the failure of the Cobre Grande Company to pay a certain $37,500 on the 26th of November, 1899. I contended that we could win notwithstanding that. We

claimed that Mr. Greene had wrongfully ousted us from the possession of the property in Mexico, and thereby deprived all of an opportunity of making money that we thought we were going to make in Mexico. (Trans., 84-87.)

Norton Chase, on behalf of defendants, testified, in substance, as follows:

That the Greene Consolidated Copper Company had twenty-one directors at the time the contract was made with Mr. Gage in December, 1900, and about fifteen hundred or two thousand stockholders located over the United States and many parts of Europe. (Trans. Rec., 87.)

W. C. Greene, witness for defendants, testified, in substance, as follows:

I know J. Edward Addicks, intervenor in this case. Have met him since the contract of December 12, 1900, and offered him $3.00 a share for his stock in the Cobre Grande Copper Company. He said I don't care about selling my stock, it is a pretty good investment, I think we will make a success of the Cobre Grande Copper Company. (Trans. Rec., 87.)

W. C. Greene, called for plaintiff, testified:

The par value of the Greene Consolidated Copper Company stock is $10.00 per share. I think it is selling on the market to-day for $26.25. It has gone as high as $50.00 and as low as $2.00. In February, 1901, we offered the stock to the public at $5.00 per share and paid 20 per cent commission for selling. The capital stock of the Company was then $5,000,000, it is now $6,000,000. (Tr. Rec., page 87.)

W. H. Barnes, for defendants, testified, in substance, as follows:

I was elected Secretary of the Cobre Grande Copper

Company the 13th or 14th of April, 1901. Mr. Gage turned over $60,000 to me as Treasurer at about that time; there was some paid out, don't remember the payments. Turned over to the Treasurer about $50,000. Am satisfied that there is that much in the treasury now. Hallenborg never demanded payment while I was Treasurer. I was present part of the time the negotiations between Gage and Greene which resulted in the contract of December 12, 1900, didn't hear it all. Case tried before Judge Street at Phoenix; was submitted after hearing all the evidence and final argument, and the Court announced that it would have the stenographer write out as much of the testimony as we desired and subsequently render its decision.

After the contract of December 12, 1900, was made, I did not go into court myself, but understood the order of submission was set aside. After the final payment, met Mr. Chalmers in Phoenix one day; he said that the bank was interested in getting rid of the escrow papers, then he spoke about this suit. That was the first time I had heard of it. My clients had not been served, and he said Hallenborg was complaining that the agreement was to dismiss that law suit in Phoenix and other law suits. One of us said that if he complains of dismissing all suits we will resubmit them and have them decided. We concurred in that. My recollection, is that Judge Street was holding court in Yuma at that time, and we sat down and wrote a little paper of three lines. It was agreed that the case should be decided and we hoped at the earliest convenience of the court, and both signed. My recollection is, that it was sent to Yuma, and the next thing I heard was that the Judge had decided in our favor. I wrote out the judgment in accordance with the decision as I found it to be and sent

it to Mr. Chalmers, attorney on the other side, in accordance with our practice, that he might o. k. it and send it to the Judge.

Counsel for Greene or the Greene Consolidated Copper Company never went into the court or consented to the entry of any judgment in that case.

The Cobre Grande stock which was bought from Gage under the agreement of December 12, was paid for with money of the Greene Consolidated Copper Company and the stock delivered to the Treasurer of that Company.

Cross-examination:

The Greene Consolidated Copper Company is a corporation of West Virginia; W. C. Greene is president. It took possession of this mining property in Sonora subject to all the rights and equities of the Cobre Grande Copper Company, and a great deal of other property. (Tr., page 88.)

L. H. Chalmers recalled for defendant.

I want to make a correction. I think I stated on my examination that when I was talking with Judge Barnes that this suit had been commenced in Prescott by Hallenborg; whether it had been commenced at that time I don't know. What I meant to say was, that I knew Hallenborg was objecting to the whole situation. I now remember sending the little memoranda made by myself and Judge Barnes to Yuma, and I merely announced it in open court after he returned. It may be that the Phoenix National Bank had been served with an application for an injunction in the present suit before the resubmission in Phoenix, but I don't remember one way or the other. (Tr., pages 88-89.)

J. C. Herndon, called for defendants, testified, in substance, as follows:

With reference to the 5,000 shares of stock that went

Cross-examination:

Nothing came of the contracts for options for the sale of stock. The first one that took effect was that I made with Mr. Greene. At that time was negotiating in both capacities. The new Board of Directors of the Cobre Grande Copper Company were not all present when we had the preliminary meeting in consulting about that matter. They were present at the time of the execution of the contract. Can't recollect who of the stockholders were present at the ratification. Mr. Bennett was there representing Mr. Hallenborg; don't know whether he read the contract before it was executed or not. He was not present at the negotiations between me and Greene. I called his attention to the provisions of the contract; handed him a copy of the agreement. He was not present at the stockholders meeting when the approval was adopted, nor at the meeting of the Board of Directors that ratified it. Judge Hawkins was present. The first I heard of Mr. Hallenborg was the sending of the check; that was the first information that he acquiesced in the terms of the contract. I think I had telegrams from Hallenborg during October, but don't recollect what they were; they did not bear upon the question of the contract. Bennett said that Hallenborg was not satisfied with the position he had taken in this matter and had revoked his power of attorney. It was afterwards I got that telegram repeated to me from Prescott; I was in Phoenix. Mr. Hallenborg's attorney was present at the meeting ratifying this contract and protested. I was president of the Cobre Grande Copper Company on the 25th of November, 1899, when the suit was brought by the Company against Greene in the Third District. I did not think, personally, that we had any

grounds to stand on. Hallenborg was informed of all the conditions of the case. I obtained and used money for the purpose of conducting the litigation. The $25,000 I received was for the purpose of paying an obligation of the Company. It was payable to me as trustee for certain stockholders of the Cobre Grande Copper Company, whose name I don't recollect. The money was paid to them. I didn't make any effort to apply the $60,000 to the payment of the New York notes. The notes were sent out to me and then withdrawn. I don't think any notices were sent to any of the creditors to the effect that the money was collected for the payment of the notes they held. I had not notified any of them except possibly Mr. Shirley; he sent his notes to me and afterwards withdrew them. At the meeting of April 3, 1901, when I resigned, I think all the directors were present, Judge Herndon, Mr. Chalmers, Mr. Greene, and I don't know who else. The purpose of the meeting was to act upon the resignation of the officers of the Company in obedience to the contract of December 12. I resigned and Mr. Greene was elected president; he was also president at that time of the Greene Consolidated Copper Company, the adversary of the Cobre Copper Company in the litigation, and at that time the suits were pending and undetermined. I knew that Mr. Greene was president of the other Company, and that he was defendant in that action. Mr. E. B. Knox was treasurer of the Cobre Grande Copper Company at that time, and he resigned and W. H. Barnes was elected in his place. I knew that Barnes was counsel for Mr. Greene; I knew at the time that these new directors were mainly counsel for Mr. Greene, who was defendant in the case which we had been prosecuting. I knew the new board was associated with Mr. Greene as counsel after they were elect-

ed. I returned Mr. Hallenborg's stock to his attorney, Judge Hawkins, after I had sent him the check and he returned it to me in December, some little time after; I should say it was longer than a few days; think within a few weeks.

The action in the Third District in Phoenix was begun November 25, 1899, as I recollect. I don't recollect the original counsel employed for plaintiff in that case. Herndon & Norris, Baker & Bennett and L. H. Chalmers were in that case afterwards for plaintiff. Those are the gentlemen to whom those 5,000 shares of stock was to be taken as lawyers' fees for conducting the legal business of the Company up to practically the time that it passed into the hands of Mr. Greene. I could not tell just when each one started in. My recollection is, that it was at the beginning of this suit in the Third District. They conducted the litigation in Mexico, El Paso and other places. Mr. Chalmers went to Mexico; I think Baker went to Mexico once or twice; it was on this litigation with reference to the Cobre Grande property in Cananea. There was litigation in Mexico. The litigation in El Paso was with reference to the copper matte. Something was paid the attorneys before this; can't say how much. No bill was presented to me in writing. They told me that they claimed that amount for their services. No statement was made by the Treasurer of how much had been paid out; think it was over $1,000; I don't know whether it was over $5,000; I don't think it was over $10,000; it was between $1,000 and $10,000. I don't know to whom it was paid, or whether all three. I didn't investigate at that time. They told me what their claim would be and I claimed that much of Mr. Greene. He paid the attorneys in the case, and they

claimed so much, and he accepted to 5,000 shares of stock. I can't say what their services were. Was not present at the trial in Phoenix. Think Mr. Jamison made the argument in the case. I don't know who examined the witnesses. When I brought that action I don't know whether I consulted any of those lawyers about it; I presume I directed them to bring the action, don't recollect. Think a resolution was passed directing the action to be brought, but don't recollect. I presume I consulted with the lawyers for the plaintiff, the attorneys for the Cobre Grande Copper Company at the time the action was brought. They advised me that they had a good cause of action at the time, and I considered it my duty, as president of the Company, to bring the action. I understood at that time that the action involved practically all the property of the Company. The case was tried some time in October, 1900, before Judge Street; don't know how long the trial took. Between October and the 12th of December there had been no decision rendered by Judge Street in that case, and I had no previous communication as to what his decision would be, and no means of getting any. My attorneys advised me that they didn't think that there was any possibility of winning the case. Judge Herndon told me that when he came to Prescott after the trial, and I was so informed by Baker & Bennett practically about the same time or soon after. Don't recollect how soon after. They so advised me in December, soon after Judge Herndon spoke to me about it. They said they thought that they had not made a case we could win under. I don't know that the points were given to me; I think it was because they hadn't shown sufficient cause why the $37,500 was not paid. Mr. Jamison always advised that he would win the case. I understand that he took a prominent

part in it. He did not advise the settlement of December 12. The object of giving the options in evidence was, in the first place, to get funds to conduct the litigation and try to get possession of the property in Mexico, and money was furnished for that purpose in New York. Mr. Orne, as I understood, furnished the first $40,000. I never heard of Mr. Hallenborg until along the summer some time; was informed that he had an interest in the option that was given to Mr. Chalmers; I think the second option. Don't recollect that Mr. Orne was connected with that. It was an option to New York people to purchase the stock of the Cobre Grande Copper Company. I had talked with Grant R. Bennett at Phoenix on that subject, and understood from him that he represented Hallenborg, who wanted to get control of the stock and wanted another option on it with the idea of getting control of the majority of the stock, and that Mr. Bennett was there representing him for that purpose. The attorneys in New York representing the Cobre Grande Copper Company in the copper matte litigation were Dowe & Hartridge, and subsequently to December 12 I removed them as attorneys for the Cobre Grande Company, and appointed in their place either Logan, Demond or Harby; I think Mr. Harby was the one appointed. Don't know whether Mr. Harby, acting afterwards, was a member of the firm of Logan, Demond & Harby or not. It was Harby, or that firm. Mr. Logan is the gentleman I mentioned as purchasing stock for Mr. Greene. At the stockholders' meeting Judge Hawkins, of Prescott, protested against the proceedings for Mr. Hallenborg. I turned over the $60,000 to Mr. Barnes in a check on the Consolidated National Bank of Tucson. That was the same Mr. Barnes that was attorney for Mr. Greene. Mr. Costello in the meeting wanted

to know what would be done with that $60,000, provided the notes were not presented, and it was discussed and considered as an asset of the Cobre Grande Copper Company, and I said that I would turn it over to the treasurer of the Company; the money did not belong to me. I did not have in my mind just at that time how the notes were divided, who held them, but I had an approximate idea of about how much was due in New York for advances made for which notes had been given, and I endeavored to cover as near as I could; I tried to get all I could. I did not then know that Judge Hawkins represented Mr. Hallenborg. I don't recollect that I ever notified any of the New York creditors. I can't state why it was not stated in the agreement of December 12, 1900, that there was a fund for the creditors. I didn't draw the contract. I am not sure who the attorneys were who drew it. Judge Herndon and Judge Barnes I think were present. The $25,000 was applied to some of the creditors of the Cobre Grande Copper Company to the people who advanced out of their holdings stock to the extent of 10,000 shares, which was given to Sandoval for his services in Mexico. I have not the list with me. There was Dort and Adamson and a good many of them who contributed a small portion of their holdings—quite a good many. I don't know of the application of any particular sum towards my salary out of this money obtained under the agreement of December 12. I retained what I had; the contract was 5,000 shares of stock. They afterwards paid me $50,000 in lieu of that. I don't know how much of it was for salary; might call it all salary or expenses or anything else, salary and expenses—don't recollect how it was divided. There was a salary of $15,000 a year voted me at one of the meetings; I think that was November, 1900.

of said stock at $2.50 per share. That Orne failed to purchase the stock under said option.

That Gage subsequently, as trustee, entered into various option contracts with various parties, all of which fell through; and that afterwards Hallenborg and Costello undertook to procure an option from Gage to purchase said stock at $2.50 per share. That various contracts were drawn and submitted, but were not acted upon.

That about the first week in December, 1900, Gage opened negotiations with Greene to sell him the stock, and that Greene offered him a better price than anybody else had ever offered.

That Gage consulted the directors and a large majority of the stockholders of the Cobre Grande Company, and they urged him to enter into the contract with Greene for the sale of said stock. That the stock represented by Gage comprised the entire stock of the Cobre Grande Company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties. Thereupon Gage took the matter up with Greene, and on December 12, 1900, entered into the contract of that date mentioned in plaintiff's complaint.

That after the contract was made a meeting of the Board of Directors and a meeting of the stockholders of the Cobre Grande Company was held, and said contract was ratified in its entirety by the directors and by a majority vote of the stockholders; Hallenborg being present at the stockholders' meeting and protesting against the ratification. Immediately upon the execution of said contract, Greene paid fifty cents per share for each of the shares represented in the pool, including fifty cents a share, then held by Hallenborg. Afterwards Greene complied with his contract and paid up

the full purchase price for the stock as agreed upon in the contract of December 12, 1900, and said stock was delivered to him and the Greene Consolidated Copper Company in accordance with said contract of December 12, 1900.

That all of the stockholders accepted the money so paid to Gage and ratified said contract, except Hallenborg, who returned the money sent him and declined to be bound by the contract.

That the contract of December 12, 1900, was entered into by Gage in good faith with the full knowledge and consent of the directors of the Cobre Grande Copper Company, and upon the advice of counsel of the Cobre Grande Copper Company that the Company could not successfully maintain its suit No. 3437, and with the belief on his part that said contract was for the best interest of said Company and its stockholders.

That there was no agreement between Gage or any other persons whereby the directors, Adamson, Wood and O'Keefe, or any of them, were to derive, or did derive, any benefit, except such benefit as they derived from the sale of their stock.

That the suits mentioned in plaintiff's complaint as pending in New York are still pending; that all other suits mentioned in plaintiff's complaint were dismissed or otherwise disposed of by final judgment prior to this action; that the $25,000 mentioned in the contract of December 12, 1900, was for the purpose of discharging certain outstanding notes due by the Cobre Grande Company to its creditors; that the $30,000 cash mentioned in said contract was for the purpose and intended by the parties to be turned into the treasury of the Cobre Grande Company to pay its debts; that the 3,000 shares of the capital stock of the Greene Consolidated Copper Company mentioned in said contract, or

the $30,000 which Greene had a right to pay in lieu thereof, together with the $30,000 last above mentioned, was intended by the parties to be paid into the treasury of the Cobre Grande Copper Company for the purpose of paying the Company's indebtedness outside of the $25,000, a portion of which indebtedness Hallenborg claims in this action.

That the 5,000 shares of the Greene Consolidated Copper Company mentioned in said contract agreed to be paid to Gage was intended by all the parties as compensation to him for services rendered as president of the Cobre Grande Copper Company, and as compensation for his time, labor, trouble and attention given to the Company's business, and for money advanced to and for said Company, and expenses paid in attending to the affairs of said Company and in connection therewith.

That the 5,000 shares of stock of the Greene Consolidated Copper Company mentioned in said contract as agreed to be paid to Chalmers, Baker & Bennett, and Herndon & Norris, attorneys for the Cobre Grande Company, was intended to be paid as compensation for their services rendered to the Company in various litigations.

That the $25,000 first above mentioned was paid by Greene and used in paying said creditors.

That the $30,000 first mentioned above was paid by Greene to Gage and by him turned into the treasury of the Cobre Grande Copper Company.

That the 3,000 shares of the capital stock of the Greene Consolidated Copper Company above mentioned, in lieu of which Greene had the option of paying $30,000, was paid in cash by Greene to Gage and by him paid into the treasury of the Cobre Grande Copper Company.

That the 5,000 shares which was intended as compensation to Gage was paid in cash, to wit: the sum of $50,000.

That the 5,000 shares of the Greene Consolidated stock mentioned in said contract as being intended to be paid to Chalmers, Baker & Bennett, and Herndon & Norris, $50,000, was paid in cash in lieu thereof, and said cash was distributed among said attorneys, and the proof tends to show that their services were reasonably worth that amount, with no evidence to the contrary.

That the note of Costello mentioned in the contract of December 12, 1900, was conditioned upon the Cobre Grande Copper Company obtaining possession of its property in Mexico, said note was not to be paid until ninety days after such recovery of possession, and was turned over to Costello, as provided by the terms of said contract.

That the only property now in possession of the Cobre Grande Company within the jurisdiction of this court is a certain sum of money held by the treasurer of the Company, which was paid to him as a part of the proceeds of the agreement of December 12, 1900.

That the temporary restraining order granted in this action enjoining defendants from carrying out the terms and provisions of the contract of December 12, 1900, and dismissing any and all actions then pending in behalf of the Cobre Grande Company, and enjoining defendant Phoenix National Bank from delivering up any of the papers and documents held by it in escrow evidencing the title held by the Cobre Grande Copper Company to the mining property described in the complaint was modified, and the part of it enjoining the Phoenix National Bank was dissolved upon the ground that the District Court of Maricopa County had ren-

dered its decision in the suit of the Cobre Grande Copper Company against Greene and others adversely to said Cobre Grande Copper Company, and that as part of the judgment of said Court, the Phoenix National Bank was commanded to deliver up said papers and documents to Greene, and that as this case now stands there is nothing before the Court except an application for the appointment of a receiver. (Trans., pages 193 to 200.)

ARGUMENT.

From the above findings it is apparent that all of the suits mentioned in plaintiff's complaint, except the New York suit, had been dismissed or disposed of by final judgment before this action was commenced, and that that suit is being prosecuted by plaintiff Hallenborg.

That all of the defendants who were officers or directors of the Cobre Grande Copper Company, and whom plaintiff prays may be compelled to prosecute said actions, had ceased to be officers, directors or agents at the time the action was commenced.

That the Phoenix National Bank had delivered the papers and documents constituting and evidencing the title to the property in controversy to Greene or the Greene Consolidated Copper Company before this action was commenced, under the command of the District Court of Maricopa County in cause No. 3437, and there was no attempt toward an account.

It is apparent, therefore, that the Court could not comply with the prayer of plaintiff's complaint as to these matters, and that there was really nothing before the court except an application for the appointment of a receiver (as the court found), with authority to bring

an action in the courts of Sonora, Mexico, to recover the property which it claims belongs to the Cobre Grande Copper Company under the option executed by Greene to Mitchell in November, 1898, and by Mitchell transferred to the Cobre Grande Copper Company, for the following reasons:

POINT I.

There is no necessity for a receiver to sue, because plaintiff as a minority stockholder has the right to institute all suits and redress all wrongs or injuries similar to the one complained of in this action, without the intervention of a receiver; and in Arizona it has been settled that a minority stockholder has the right to institute a proceeding of the kind here.

Wiser vs. Lawler, 62 Pac., 695, affirmed by the Supreme Court of the United States in 189 U. S., page 260.

And because in Arizona every action shall be prosecuted in the name of the real party in interest. Paragraph 1299, Revised Statues of 1901.

(a) Ordinarily, an action to enforce rights or protect the interests of a corporation should be brought in the corporate name.

(b) Where the officers or managers of a corporation refuse, upon proper request, to bring such action, it may be brought in the name of the stockholders.

Wright vs. Oroville M. Co., 40 Cal., 20.
Ashton vs. Dashaway, 22 Pac., 660, S. C., 23 Pac., 1091.
Hawes vs. Oakland, 104 S., 450.
Davenport vs. Dows, 18 Wall., 626.
Ide vs. Bascomb, 72 Pac., 63.

A suit thus brought by a shareholder is in behalf of

the corporation itself. In all such cases it is necessary to join the corporation as a party defendant, because the right asserted belongs to the corporation and it is an interested party.

Davenport vs. Dows, supra.
Moyle vs. L. Admrs., 83 Cal., 579.
Bell vs. Donahoe, 17 Fed., 710.
Smith vs. Ferries & Cliff House Ry. Co., 51 Pac., 715.
Danemeyer vs. Coleman, 8 Sawyer, 51; S. C., 11; Fed., 97.
Hawes vs. Oakland, 104 U. S., 450.
Smith vs. Dorn, 96 Cal., 73.

A corporation though joined as a defendant, is so far considered the real plaintiff, that if it be a resident of the State in which the action is pending, and the stockholder plaintiff be an alien, the Federal courts are ousted of jurisdiction.

Danemeyer vs. Coleman, supra.

All of these and numerous other cases in all jurisdictions show that relief will be granted for the benefit of the corporation and for its stockholders, upon the suit of a stockholder without the intervention of a receiver.

In *Burns vs. City of Atchison*, 29 Pac., 582, the Supreme Court of Kansas decides this precise question. It says:

> "It is said that the equitable jurisdiction of the court to appoint receivers is not to be doubtingly exercised, and never where there is any other adequate remedy; but in this case, as has been stated, there is neither authority nor necessity for providing the city of Atchison with a representative or receiver. It is a competent party in any proceeding to protect its rights as a stockholder, and

if the officers of the corporation have made fraudulent contracts, or are engaged in transactions which will result to the injury of the corporation or the city, as one of its stockholders, it may maintain an action in its own name to protect its own or the interests of the corporation, or to obtain any equitable remedy to which it is entitled. Ordinarily, an action to enforce rights or protect the interests of a corporation should be brought in the corporate name; but where the officers or managers of the corporation refuse, upon proper request, to bring such action, it may be brought in the name of the stockholders.

4 Amer. & Eng. Enc. Law, 280, and cases cited.

"It is conceded by both parties that, if a cause of action exists in favor of the city in this case, it may be prosecuted in the name of the city; and, if that is true, what reason is there for the appointment of a representative of the city, and what authority is there for the substitution of another as plaintiff in its stead? The counsel for the receiver argue at great length and cite numerous authorities to sustain the right of the city as a stockholder to bring the action, and thereby has furnished an argument against the appointment of a receiver, and his substitution in the place of the city. If a cause of action exists in favor of a stockholder, and the corporation refuses to proceed upon proper request, the city, as a stockholder, is a real and competent party to bring the action, and there is no necessity or reason in substituting a next friend or receiver to sue for it."

POINT II.

The court in this action and under the proof, has no right or authority to appoint a receiver, because no ultimate relief is sought, except the mere appointing of a receiver.

to Mr. Gage under the agreement of December 12, 1900, I don't know that I can give you all that was said or even approximate it, but the question came up, and I said that Mr. Gage ought to be paid for his services, he had been out a great deal of money and had spent a good part of his time for a year or more, and I said he ought to be paid for it, and Greene said, I can't do it, I am out just the last dollar and won't pay any more; Mr. Gage said to let it go and walked out. I took the matter up again and urged the payment of Mr. Gage's expenses and his salary, and for an hour or two that matter was discussed, and finally Greene said "put it in and I will pay it." (Tr., page 89.)

J. M. Jamison, called for plaintiff, testified, in substance, as follows:

Direct examination:

I was present at Judge Street's court in Phoenix when Mr. Chalmers submitted the case of the Cobre Grande Copper Company against Greene and others. It was Saturday the 13th of April, 1901, the law day. (Tr., page 89.)

Plaintiff's counsel then offered in evidence the resolution of the Board of Directors of the Cobre Grande Company of date April 3, 1901. (Tr., pages 89-90.)

Plaintiff then read from the clerk's minutes showing that the complaint in the present action was filed January 3, 1901; also showing the granting of an injunction in present action on April 11, 1901, and the service of injunction; also return attached to writ of injunction showing service on April 13, 1901, on Greene, the Cananea Consolidated Copper Company, the Greene Consolidated Copper Company, and on J. H. Martin, member of the firm of Barnes & Martin; also return of service of writ of injunction and papers attached

and read the writ of injunction April 11, 1901, and read from the files of the court in the present case the date of answer of Greene Consolidated Copper Company and the Cananea Consolidated Copper Company, February 22, 1901, and date of answer of Greene, February 9, 1901. Testimony closed. (Tr., pages 90-91.)

On September 18, 1902, the court made and filed its findings in writing. (Tr., pages 145-153.) And as conclusions of law decided that plaintiff was not entitled to any relief in the action; denied the application for appointment of receiver, and dismissed plaintiff's complaint, ordered judgment accordingly, and rendered judgment in favor of defendants. (Tr., pages 154-155.)

Plaintiff moved for a new trial on various grounds (Tr., pages 155 to 160), which was by the Court denied, and he appealed to the Supreme Court of the Territory.

The case came on for hearing in the Supreme Court of the Territory, and the judgment of the lower court was affirmed. (See opinion Tr., pages 169 to 174.)

Petition for rehearing was filed in the Supreme Court of the Territory, and denied (Tr., pages 174 to 181 and 215), and the case is now brought here by appellant for review in this Court on a statement of the facts of the case in the nature of a special verdict found in the transcript (pages 193 to 200), being the same findings made in the court below.

FINDINGS.

The findings of the Supreme Court of the Territory, briefly stated, are as follows:

It finds the organization of the corporations, the residences of the parties, the capitalization of the Cobre Grande Copper Company, the officers of the Cobre

Grande Company and their resignation, as alleged in the pleadings.

That Hallenborg and Addicks were stockholders when the suit was commenced, and that Hallenborg was the owner of the notes mentioned in plaintiff's complaint.

That the Cobre Grande Copper Company was engaged in a series of law suits with defendants, Mitchell and Greene, and their associates in Sonora, in Arizona, in Texas and in New York.

That in suit No. 3437, at Phoenix, Arizona, brougnt by the Cobre Grande Copper Company against Greene, Mitchell and the Phoenix National Bank, the said Company alleged, among other things, all the facts set forth in paragraph 3 of plaintiff's original complaint in this action, and prayed for an accounting against Greene for the products of the mines, and for the supplies, material and property of the Company alleged to have been taken and appropriated by him; and issues were joined by the defendants in that action, and finally resulted in a judgment for defendants dismissing plaintiff's complaint. That said judgment has not been appealed from or taken up by the writ of error or proceedings to the appellate court.

That plaintiffs were stockholders in the Cobre Grande Company at that time.

That in November, 1898, Greene owned certain property in Sonora and had options to purchase other properties there, being the same mentioned in plaintiff's complaint.

That in said month Greene executed an option on said property to defendant, Mitchell; that the option contract provided that Mitchell should pay $12,500 in cash, $37,500 to be paid on or before November 26,

1899, and $100,000 on or before November 26, 1901, and $100,000 on or before November 26, 1902.

That Greene and Mitchell in April, 1899, with other parties, organized the Cobre Grande Copper Company; that 199,995 shares of the stock of said Company were turned over to Mitchell in consideration of his option from Greene, which option was afterwards assigned to the Cobre Grande Copper Company, subject to the rights of Greene therein. That the Cobre Grande Copper Company entered upon the property and began to operate the same in September, 1899.

That in October of 1899 controversies arose between Cobre Grande Copper Company and Greene over the option and right of possession of said property, and that Greene entered into possession about that time. Thereupon the Cobre Grande Company instituted a suit in Sonora to recover possession of the property, and a suit in Maricopa County, No. 3437, to restrain the delivery to Greene of the deeds which were put in escrow under the contract with Mitchell and thereafter assigned to the Cobre Grande Company.

That a temporary injunction was granted in No. 3437 restraining the Phoenix National Bank, as escrow holder, from delivering the escrow papers, and restraining Greene from demanding or receiving same from the bank.

While this litigation was in progress, a majority of the stockholders of the Cobre Grande Company, to the extent of 115,049 shares or thereabouts, entered into a pooling arrangement by which said stock was delivered to E. B. Gage, with power to vote the same at all meetings, and granting to Gage the right to dispose of said stock at his discretion.

That on January 5, 1900, Gage, as trustee, entered into a contract with one Benjamin Orne for the sale

mined; but this is only by virtue of his interest in the property and that it is being wasted.

See *Cook on Corporations,* Vol. 2, Secs. 746-747, 4th Ed., where the New York statutes and rule are discussed.

In *Attorney General vs. The Utica Ins. Co.,* 2 Johnson's Chancery, 375, Chancellor Kent holds that a court of equity has no visitorial powers over corporations and no power to remove the officers appointed by the charter to manage the business of the corporation; and in the same case held that the directors of a corporation are accountable to a court of equity for a fraudulent breach of trust.

The same effect,

Matter of *Binghamton Gen. Electric Works,* 143 N. Y., 263.

Atty. General vs. Niagara Bank, Hopkins Ch. (N. Y.), 354.

Waterbury vs. Mchts. Union Express Co., 50 Barb. (N. Y.), 157.

Verplank vs. Mercantile Ins. Co., Edwards Ch. (N. Y.), 84.

Hand vs. Dexter, 41 Ga., 454.

Hamilton vs. Accessory Transit Co., 3d Abbott Pr. (N. Y.), 255.

French vs. Gifford, 30 Iowa, 148.

Vanderbilt vs. Central R. Co., 43 N. J. Eq., 669.

In Arizona, in the Revised Statutes of 1887, Sec. 233, among other things the following powers are conferred upon corporations: subdivision 2: To sue and be sued by the corporate name; subdivision 6, to make contracts, acquire and transfer property, possessing the same powers in such respect *as private individuals now enjoy;* and Sec. 234, in subdivision 5, provides by what officers or

persons the affairs of the corporation are to be conducted and the times at which they are to be elected.

Sec. 765 Rev. St. Arizona, 1901, has similar provisions to Sec. 233, St. of 1887 and Sec. 766 as amended by Act of Leg. of 1903, p. 140, has provision like Sec. 234.

The articles of incorporation of the Cobre Grande Company introduced in evidence specifies that the business of the company shall be managed by a board of directors. The statute and the articles of incorporation, taken together, prescribe the powers of the Cobre Grande Company; the tenure of its officers and the mode of their election. What power has a court of equity to set aside the statute or impose other conditions upon them, otherwise than as provided in the statute? The charter measures its power and the manner of conducting its business and the persons who shall conduct it.

The cases above referred to also hold that the only method of forfeiting the charter of a corporation is by proceeding in the nature of *quo warranto*, and this is in exact accordance with the rule prescribed in the Revised Statutes of Arizona of 1901. Paragraph 28 provides: "that no corporation formed under the laws of this Territory shall be dissolved, or its rights impaired except by judicial procedure;" and the corporation, having received its life through the legislative grant above mentioned, can only be forfeited by the power that granted it. Par. 772 is a further limitation upon the powers of the court. That section provides that the corporation shall not be dissolved prior to the period fixed upon in the articles of incorporation, except by a majority vote of the members, except a different rule is adopted in the articles, and Par. 775 provides: "that corporations whose charters expire by their own limitations or by the voluntary act of the stockholders may, nevertheless, continue to act for the

purpose of closing up the business, but for no other purpose, unless renewed as in this chapter provided."

Where the statute prescribes a particular method for dissolving a corporation, that method must of course be pursued.

People vs. P. & T. Co. of C., 38 Cal., 172-173.

We have shown that the appointment of a receiver is in effect the dissolution of the corporation; then it must follow that the appointment sought for in this action is prohibited by the sections of the Revised Code above quoted.

A corporation has the same power over its corporate property, and is capable of taking and holding property, as wholly as natural persons, except in so far as they are restrained by statute. That under this general power, unless restrained by statute, a corporation may dispose of the whole of its corporate property, for any lawful purpose without the assent of its stockholders.

People vs. P. & T. Co of C., 38 Cal., 171-172.

This case holds that property of a corporation can be disposed of without the assent of the stockholders, under a section of the California Code, which is nothing like so broad as the paragraph of the Revised Statutes of Arizona of 1901, which gives the directors the power to make contracts as freely as individuals.

In 1880 the California legislature passed a statute, the first section of which provides as follows: "That it shall not be lawful for the directors of any mining company to sell, lease, transfer or otherwise dispose of any part of the mining ground owned or held by said corporation, nor to purchase or obtain in any way additional mining ground unless such act be ratified by the

owners of at least two-thirds of the capital stock of such corporation," and provision is made as to the method of ratification.

In the case of the *Granite Gold Mining Co. vs. Merginness*, 50 Pac., 269, 118 Cal., 132, the Supreme Court of that State, in construing this statute, held that the general presumption of the power of corporations to buy and sell real property must prevail except in those cases where the facts appearing of record show that the case is within the restrictions of the Act of 1880, and that a sale is valid without the assent of the stockholders, unless it appears that the sale and conveyance are of its mining ground, for the reason that the restriction of the statute applies not to a sale of its property generally, but only to that of its mining ground. In other words, that the plaintiff in that case was required to show that he was within the exception of the statute.

In *Williamette Mfg. Co. vs. Bank of British Columbia*, 119 U. S., 191, the question was whether a corporation had the right to mortgage its franchise.

Appellants in that case, as in this, argued that a corporation could not do that because it destroyed the purposes for which the corporation was formed.

The statute creating the franchise gave to the corporation "the exclusive right of the hydraulic powers and privileges created by the water it takes from the Santiam River, and declares that it may use, rent *or sell* the same, or any portion thereof, as it may deem expedient."

The Court by Mr. Justice Miller said:

"The charter itself seems to have given unlimited power to the Company to sell everything it had * * * and held that the power to sell included the power to mortgage." In other words, the Supreme

Court in that case held what the courts have always held, that the charter is in measure of the power of the corporation, and that it could do anything that its charter authorized it to do.

The statute in Arizona, like the statute of Oregon, mentioned in the *Williamette Company case*, 119 U. S., 191, is an enlargement of the powers of the corporation.

Plaintiffs claim that the result of the contract of December 12, 1900, destroys their rights, and even go so far as to claim that the property of the Cobre Grande Copper Company was disposed of without consideration, and that they were deceived by concealment of secret provisions with reference to the $60,000 paid by Greene, which went into the treasury of the company.

In the first place, Mr. Gage did not, nor did anybody, attempt to sell, or in fact sell any of the property of the Cobre Grande Copper Company. In the next place there was no concealment whatever. The only property sold by Mr. Gage, as agent or representative or otherwise, were the shares of the several stockholders who entered into the pooling agreement, and which were owned by them in private proprietorship. (Findings V, VII—VIII; Trans., pages 195-198, inclusive.)

The court found that Mr. Gage consulted the directors and a large majority of the stockholders of the Cobre Grande Copper Company, and they urged him to enter into said contract with Greene for the sale of the stock. That said stock represented by Mr. Gage (participating in said contract) comprised the entire stock of the Cobre Grande Copper Company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates, and about 6,500 shares owned by other parties.

The court also found that the contract of December 12, 1900, was entered into by Gage in good faith, with the full knowledge and consent of the directors of the Cobre Grande Copper Company, and upon advice of counsel of the company that it could not successfully maintain its suit, No. 3437, in Maricopa County, and with the belief on the part of Mr. Gage that said contract was to the best interest of said Company and its stockholders. (Trans., page 198.)

Their argument is that the agreement of December 12, 1900, was on its face a constructive fraud. The court has found that there is no actual fraud, and the authorities are abundant to the effect that where there is no actual fraud in a sale, even by a corporation to one of its directors, corporate creditors can not attack it for constructive fraud arising from the trust relationship between the purchaser and the corporation.

Crymble vs. Mulvaney, 40 Pac., 499.

POINT IV.

If the agreement of December 12, 1900, was constructively fraudulent, it had been ratified by the directors and by a majority of the stockholders, and there can be no question but what the acts constituting constructive fraud can always be ratified, except in the few instances where the statutes make certain acts conclusively fraudulent.

Twin Lick Oil Co. vs. Marbury, 91 U. S., 589.

In *Gamble vs. Water Co.,* 123 N. Y., 91; 25 N. E. 201, a director, was permitted to contract with his corporation where a majority of the shareholders being fully apprised of the nature of the transaction authorized it. If it can be authorized it can be ratified.

In this case the sale of the stock by Mr. Gage was not only authorized in advance, but his action was ratified subsequently by the directors and by a majority of the stockholders.

In addition to this there is no rule of law or morality that we know of which would prevent the owner of property selling it to whom he pleased, or that forbids a director of a corporation to resign at his pleasure.

POINT V.

The appointment of a receiver is one of discretion in the court to be exercised as an auxiliary to the attainment of the ends of justice: is of high and unusual character, and is never exercised, because the appointment can do no harm. In order to obtain the appointment of a receiver, plaintiff must show, in cases where the property is in possession of defendant: first, that he has a clear title to it; and secondly, that the possession of the property by defendant was obtained by fraud.

It is also held that the discretion of the court to appoint a receiver will not be exercised where no perceptible benefit will result from the appointment, but great confusion and difficulty, and probably great injury to both parties, while no injury will apparently be caused by failing to make the appointment.

Hamburg Mfg. Co. vs. Edsall, 8 N. J. Eq., 142.

The record shows that the Cobre Grande Company is not in possession, but that Greene, or the Greene Company, is, and in the absence of any proof or finding of fraud the presumption of law is that they are rightfully so. Fraud is never presumed, but must be proved.

We have shown in the preceding pages of this brief that plaintiffs can secure by suit brought by them on behalf of the Cobre Grande Company every relief that

a receiver or that the Company itself could obtain if brought in its own name, and that it is unnecessary to appoint a receiver to sue on their behalf.

If the court were to appoint a receiver, his jurisdiction would not extend beyond the Territory of Arizona. The receiver's remedy, if any he has, would be just such as the corporation has. And, if the corporation were to sue in Sonora, its only remedy would be for the recovery of the possession of the property there, and plaintiffs as stockholders can sue there by showing the failure or refusal of the corporation to sue, just as the records show they have done in New York.

Plaintiffs claim that because the agreement of December 12, 1900, provides for the payment to Mr. Gage of 5,000 shares of the Greene Consolidated Company's stock for his own use, and 5,000 more for the use and benefit of Chalmers and the other attorneys for the Cobre Grande Copper Company, that they were injured, and that it was a fraud upon their rights.

The findings of the court show that there was no concealment about this matter, and that Mr. Gage acted in good faith; that the directors and a majority of the stockholders, including Mr. Hallenborg, one of the plaintiffs, were fully advised of the settlement; that the directors and a majority of the stockholders urged it; that said 5,000 shares agreed to be paid to Gage was intended by all the parties for compensation to him for services rendered as president of the Cobre Grande Copper Company, and for the time, labor, trouble and attention given to said Company's business, and for money advanced to a d for said Company, and for expenses paid in attending to the affairs of the Company, and in connection therewith. That this is perfectly lawful under the authorities there can be no question.

Thompson on Corporations, Vol. 3, Section 4025, lays down the rule as follows:

> "The rule deducible from the authorities that a "trustee is prohibited from making a profit out of "his trust relation, means that he must not make "a *secret profit* out of it. His duty is not to avoid, "wholly, the doing of anything for his own benefit, "his obligation to the beneficiaries in the trust is to "make a full, fair, and complete disclosure of all "the circumstances attending any transaction which "will benefit himself in any manner different from "the manner in which all the shareholders will be "benefited."

To the same effect:

> *Twin Lick Oil Co. vs. Marbury,* 91 U. S., 587.
> *Pneumatic Gas Co. vs. Berry,* 113 U. S., 322.
> *Oglesby vs. Atrill,* 105 U. S., 605.
> *Roy & Co. vs. Scott H. & Co.,* 39 Pac., 679.

In this instance Gage made no profit; he was simply paid for his services, time and money expended.

A director or trustee is entitled to pay in a reasonable amount for such services as he may render outside of the duties of his office of director or trustee.

> *Bassett vs. Fairchilds,* 61 Pac., 791; 132 Cal., 637.
> *Corinne Mill C. & D. Co., vs. Toponce,* 152 U. S., 405.

The objection to Chalmers and others receiving 5,000 shares, or in lieu thereof $50,000, in payment for their services as attorneys, is equally untenable. Corporations cannot avoid payment of their atorneys' fees any more than other people, and the finding is, their charge was reasonable.

POINT VI.

Plaintiffs cannot recover in this action, because they have not offered to do equity, either on their own behalf or that of the corporation.

Their claim of ownership to the mines mentioned in the complaint is based upon an option contract made between defendants Greene and Mitchell. This contract was subsequently transferred by Mitchell to the Cobre Grande Copper Company, subject to Greene's rights therein. By its terms Mitchell was to pay Greene $12,500 at the time of its execution; $37,500 was to be paid on or before November 26, 1899; $100,000 on or before November 26, 1901; and $100,000 on or before November 26, 1902. Time of payment was made the essence of the contract. The Cobre Grande Company assumed Mitchell's obligations. None of the deferred payments have been made nor do defendants or the Cobre Grande Copper Company offer to pay the same. Their claim is, that because Greene got possession of the property before the first payment of $37,500 became due, he prevented the Cobre Grande Company thereby from *the chance of finding ore, extracting, smelting it, getting it to and finding a market for it, selling it, and out of the proceeds raising the money with which to pay these deferred payments.* And therefore they ask the court to make a new contract and extend the time of payment of the sums due Greene under the contract between him and Mitchell of which the Cobre Grande Company is assignee until after it shall be restored to possession of said mines, etc. (Tr., p. 11, folio 16.)

It is a well settled rule of law, that if a party by his contract charges himself with an obligation *possible* to be performed, he must make it good unless his perform-

In *Murray vs. Superior Court*, 129 Cal., 632, 62 Pac., 191, the court uses this language:

> "There is of course no such thing as an action "distinctly brought for the appointment of a re- "ceiver. Such an appointment when made is "ancillary to or in aid of the action brought. Its "purpose is to preserve the property pending the "litigation, so that the relief awarded by the judg- "ment, if any, may be effective. The authority con- "ferred upon the court to make the appointment "necessarily presupposes that an action is pending "before it instituted by some one authorized by law "to commence it."

This is in accordance with all the authorities found in the books on the subject.

In *Enc. of Pl. & Prac.*, Vol. 17, p. 681, the author says:

> "The appointment of a receiver is not the ultimate end and object of litigation, but is merely a provisional remedy to control and preserve property pending litigation, that the relief awarded, if any, may be effective."

The same doctrine is laid down by Mr. High in his work on receivers, Sec. 6, pages 7 and 8; and

> "The appointment of a receiver is regarded as one of the most difficult and embarrassing duties which a court of equity is called upon to perform. It is a peremptory measure, whose effect, temporarily, at least, is to deprive of his property a defendant in possession, before a final judgment or decree is reached by the court determining the rights of the parties. It is, therefore, not to be exercised doubtingly, but the court must be convinced that the relief is needful, and that it is the appropriate means of securing an appropriate end. It is regarded as a severe remedy, not to be adopted save in a clear case, and never unless plaintiff would otherwise be in danger of suffering irreparable loss."

High on Receivers, Sec. 3.

Smith on Receivership, Sec. 2, says:

"The law of receiverships is peculiar in its nature in that it belongs to that class of remedies which are only ancillary or provisional, and the appointment of a receiver does not affect either directly or indirectly, the nature of any primary right, but is simply a means by which primary rights may be more efficiently preserved, protected and enforced in judicial proceedings. * * * It leaves the parties as they have placed themselves as determined by the final judgment or decree of the court."

See also *Pom. Equity*, Paragraphs 171, 1319 and 1330.

Miller vs. Bowles, 58 N. Y., 253.

POINT III.

A court of equity has no inherent power, in the absence of statutory authority, to appoint a receiver upon the application of a private person, except in cases of public or quasi public corporations, such as railroads, which are required to be kept going concerns, or in favor of judgment creditors, who have liens, or mortgagees who have liens, or in cases of infants, lunatics and formerly married women; because the effect of the appointment is to dissolve the corporation, and it having received its life from the state by its charter or general law, the State only can dissolve is. Ever since the decision in the Dartmount College case, it has been held that a corporation is a contract entered into between the sovereignty and the corporation. This contract cannot be annulled or interfered with by any action on the part of the courts. On the contrary they have upheld them, and for this reason clauses have been inserted in almost

every State constitution reserving to the State the right to modify or repeal the charters.

In *Neal vs. Hill,* 16 Cal., 150, this question was carefully considered by the Supreme Court of California, and it was there laid down as settled law that the appointment of a receiver must necessarily result in the dissolution of the corporation, and in that event the court will have accomplished in an indirect way that which in this proceeding it has no authority to do directly. That it was well settled that a court of equity, as such, has no jurisdiction over corporate bodies, for the purpose of restraining their operations or winding up their concerns, and the court adds, "that we do not find any such power has ever been exercised in the absence of a statute conferring the jurisdiction."

In 1873 the California legislature adopted part of the provisions of the New York code, but omitted to adopt certain independent provisions of that code, to the effect that a receiver of the property of a corporation could be appointed upon the petition of the execution plaintiff, when the execution issued upon a judgment rendered against the corporation had been returned unsatisfied in whole or in part, and when a corporation should have been declared insolvent for one whole year, or for that length of time had neglected or refused to pay its notes or other evidences of debt, or had for one year suspended its regular business.

In the celebrated *French Bank case,* 53 Cal., 495, the court held that these omitted provisions created rights in favor of private persons that did not exist before and enlarged the powers of the courts of equity in the State of New York by directly and in terms authorizing them in such cases to appoint receivers of the property of corporations upon application made to them by creditors.

stockholders and other private parties instituting proceedings for that purpose, and held: That in the absence of any such authority conferred by statute, a court of equity had no jurisdiction to make such an appointment, either under the statute or under the usages of courts of equity. In Arizona there is no statute conferring jurisdiction on courts of equity to appoint receivers except by usages of courts of equity. Section 1541, Rev. Stats. Arizona, 1901, is in substance the same as Subd. 6, Sec. 564, of California Code of Civil Procedure, which limits the power of the court to appoint a receiver to cases allowed by usage of equity.

These decisions have been affirmed by the Supreme Court of California in

Murray vs. Superior Court, 129 Cal., 631, 62 Pac., 191.

State I. & I. Co. vs. San Francisco, 101 Cal., 146 and cases cited from New York and other States.

Fisher vs. Superior Court, 110 Cal., 140, and various other decisions in that State.

The Court of Appeals of New York in *Decker vs. Gardner,* 124 N. Y., 334, holds that the jurisdiction to appoint receivers of corporations is wholly statutory and never was exercised by a court of chancery until their jurisdiction was enlarged by statute.

We have heretofore stated, that where the plaintiff has an interest in the property, for instance by vendor's lien or a mortgage, or by virtue of a judgment lien, and that the property is being wasted, that pending foreclosure proceedings, a court of equity has the power without statute to appoint a receiver to preserve the property until the litigation can be settled and deter-

entitled to relief even in an action directly assailing the judgment, for the reason that they could not aver and prove that they had a good cause of action on the merits, it being apparent from the record that they rely upon an option for the purchase of the Sonora mines which they have not complied with, or offered to comply with, and it is now too late (*Hansbrough vs. Peck supra*); and the allegations of plaintiff's complaint, if Judge Sloan's court had jurisdiction, are wholly insufficient to entitle them to any relief in any court under any rule of practice known to courts of chancery. The matters required to be shown in suits to set aside judgments are fully set forth in *Whitney vs. Kelley*, 94 Cal., at pp. 153 et seq., and it is sufficient to say here that planitiffs' complaint does not come up to the requirements.

In *Avegno vs. Schmidt*, 113 U. S., 301-2, the Court says:

> "The decree of a court of competent jurisdiction cannot be collaterally attacked by averring and proving that there was a good defense to the suit if the defendant had chosen to make it."

The contention on the part of plaintiffs that they are not bound by the decision of the District Court of Maricopa County is untenable.

In *Hawkins vs. Glenn*, 131 U. S., 329, the court says:

> "A stockholder is so far an integral part of the corporation that, in view of the law, he is a privy to the proceedings touching the body of which he is a member,"

and then quotes from *Sanger vs. Upton*, 91 U. S., 56, 58, as follows:

> "It is not necessary that the stockholders should be before the court when the order was made, any more than they should have been there when the decree of bankruptcy was pronounced. The plain-

tiff in error could not in this action, question the validity of the decre and for the same reasons could not draw into question the validity of the order. She could not be heard to question either except by a separate and direct proceeding had for that purpose."

The remedy for plaintiffs, if any they have, is to sue in Maricopa County directly, to vacate the judgment in No. 3437. This court cannot retry that case in this one; otherwise one court of concurrent jurisdiction would review the judgment of another, and litigation would never end.

The plaintiff's complaint is full of the words fraudulent, and corrupt, and general charges of conspiracy, combinations and violations of trust obligations. Mere words in and of themselves, but even as qualifying adjectives of more specific charges, they do not allege sufficient grounds of equity jurisdiction, because the transactions to which they refer are not such as in their essential nature constitute a fraud or a breach of trust for which a court of chancery can give relief.

Ambler vs. Choteau, 107 U. S., 590-591.

We respectfully submit that the judgment of the lower court should be affirmed.

BEN GOODRICH,
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Attorneys for Appellees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 87.

AXEL W. HALLENBORG, *et al.*, *Appellants*,

vs.

COBRE GRANDE COPPER COMPANY, *et. al.*

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

SUPPLEMENTAL BRIEF FOR APPELLEES.

ALDIS B. BROWNE,
ALEXANDER BRITTON,
Of Counsel for Appellees.

BEN GOODRICH,
Of Counsel.

JUDD & DETWEILER, (INC.) PRINTERS, WASHINGTON, D. C.

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Supplemental Brief for Appellees.

The original brief of appellees presents full abstract of the pleadings, evidence and findings. Since its preparation by distant counsel brief for appellants has been filed. We briefly submit:

1. The Cobre Grande Copper Company capital stock consisted of 200,000 shares of the par value of $2.50 each (Findings I, Rec., 192), whereof about 15,049 shares were delivered by the holders to the defendant Gage, with voting power and the right to sell at his discretion. (Finding VII, Rec., 196.)

Two unsuccessful efforts were made by Gage to sell (1) to a syndicate, of which appellant Hallenborg was a member; and that failing, (2) to Hallenborg direct

ance is rendered *impossible* by the act of God, the law, or the other party. Unforeseen difficulties, however great, will not excuse him. If the parties have made no provision for a dispensation, the rule of law gives none.

Dermott vs. Jones, 2 Wall., 3.
Sun Printing & Pub. Asso. vs. Moore, 183 U. S., 654-5.
Reid vs. Alaska Pack. Asso., 73 Pac., 339.

The principle of *Dermott vs. Jones* has been applied in

Osborn vs. Nicholson, 13 Wall., 658.
Railroad Co. vs. Smith, 21 Wall., 263.
Tate vs. N. Y. Life Ins. Co., 1 Flipp, 320-337.
Texas, etc., Railroad Co. vs. Rust, 19 Fed., 242.
Fruin vs. Crystal Railway Co., 14 S. W. 559, 89 Mo., 407.
Warth vs. Mack, 79 Fed., 917.
Barrere vs. Somps, 45 Pac., 179; 133 Cal., 140-105.
Livingston vs. Anderson, 11 So., 273.
Steele vs. Buck, 61 Ill., 346—14 Am. Rep., 62.
McCreary vs. Green, 31 Mich., 180.
Nichol vs. Fitch, 72 N. W., 989.
Reichenbach vs. Sage, 43 Pac., 356.

And numerous other decisions, both in the Federal and State courts.

In *Klauber vs. San Diego Street Car Co.*, 30 Pac., 555, 95 Cal., 353, defendant undertook to excuse performance of the terms of his contract on the ground that he was prevented from doing so by the appointment of a receiver who took possession of the property. In other words, prevented by operation of law.

Mr. Justice Temple collects a number of authorities and says:

"The obligor contracts that he can and will con-
"trol the acts of third parties so far as necessary
"to enable him to perform his contract. People vs.
"Bartlett, 3 Hill, 570. Nor would it be a defense
"that the law has rendered it difficult or very ex-
"pensive to perform. The rule is, if performance
"*is in itself possible*, there is a breach, although the
"obligor himself may have become wholly unable to
"perform. The suit to foreclose a mortgage against
"the property of defendant, did not render per-
"formance impossible; defendant could have paid
"the claim or given security, and had the receiver
"discharged. To warrant the application of the
"principle, the *impossibility must consist in the*
"*nature of the thing* to be done, and not in the *in-*
"*ability of the party to do it;* or as it is sometimes
"termed, be an *impossibilitas rei*, as distinguished
"from an *impossibilitas facti*. If the thing could be
"*accomplished by any one with proper means and*
"*the requisite skill and knowledge, the promisor*
"*was not less answerable because it was impossible*
"*to him.*" Hare. Cont., 639. "The principle de-
"ducible from the authorities is, that if what is
"agreed to be done is possible and lawful, it must
"be done. Difficulty or improbability of accomplish-
"ing the undertaking will not avail the defendant.
"It must be shown that the thing cannot by any
"means be effected. Nothing short of this will ex-
"cuse non-performance." The Harriman, 9 Wall.,
172. "But it seems to me the very fact that the
"thing can be done, although it may be very ex-
"pensive, to wit, it may require the defendant to
"liquidate and pay an unjust claim, shows that per-
"formance is not prevented by operation of law."

"As between individuals, the impossibility which
"releases a man from the obligation to perform his
"contract must be *a real impossibility*, and not a
"mere inconvenience. And while such an impossi-
"bility *may release the party from liability to suit*
"*for non-performance*, it does not stand *for per-*

"formance so as to enable the party to sue *and re-*
"cover as if he had performed."

Smoot's Case, 15 Wall., 46.

It certainly cannot be argued with any seriousness that it was impossible in the nature of the thing for the Cobre Grande Company to make the payment of $37,500 due on November 26, 1899. Mere inability to pay does not excuse. Nor can it be contended that because Greene took possession of the property before the contract was due, that made it impossible for the Cobre Grande Company to pay, and was prevention within the meaning of the law.

Greene and Mitchell made such a contract as was agreeable to them. Time, as to payment, was made the essence of that contract. Mitchell and Cobre Grande Company have failed to comply with it, and no court has authority to make a new one, nor to change its terms and postpone the times of payment of the money due Greene upon that contract as plaintiff's seem to think. Courts cannot make contracts for parties; its mission is to enforce them. And it is settled beyond dispute that where a party complies in part with a contract and fails or refuses to comply with another part, that he cannot recover even the money that is paid in part performance.

Hansbrough vs. Peck, 5 Wall., 506-507, a case where time of payment of the purchase money was made the essence of the contract.

POINT VII.

The judgment entered in suit No. 3437 in the District Court of Maricopa County is not void and cannot be collaterally attacked.

The court had jurisdiction of the parties and of the

subject matter, and its judgment stands until reversed on appeal or until a new trial is granted. "A judgment is a vested right in the parties by whom it is recovered. If it is sought to review, correct, cancel, or annul it, it must be done either *in the court in which it is pronounced, or in the appellate tribunal.*"

York vs. Cartwright, 42 Texas, 141-2.
Voorhees vs. Bank of U. S., 10 Pet., 449.
Thompson vs. Tolmie, 2 Pet., 157.
Hall vs. Law, 102 U. S., 461.

The rule is, that while judgments of inferior courts must show jurisdiction, jurisdiction will generally be presumed in the case of Superior Courts; but, if want of jurisdiction appears on the face of the record of the judgment of a Superior Court, the judgment is void. Where there is jurisdiction in the court to act, its judgment, until reversed or attacked by some direct proceeding to annul it, is valid and cannot be collaterally attacked.

Forbes vs. Hyde, 31 Cal., 347-8-9.
Galpin vs. Page, 18 Wall., 350.
Voorhees vs. Bank of U. S., 10 Pet., 449.
Lamp Chimney Co. vs. Brass & Copper Co., 91 U. S., 659-661.
Hall vs. Law, 102 U. S., 461-464.
Mattingly vs. Nye, 8 Wall., 370.
Comstock vs. Crawford, 3 Wall., 396.

The important question then is, does want of jurisdiction appear on the face of the judgment rendered in the District Court of Maricopa County? To ask the question is to answer it.

Under the rule laid down in *White vs. Crowe* 110 U. S., 187, and other cases cited, plaintiffs would not be

"It is accordingly held that corporations of a private nature established solely for *trading* or *manufacturing* purposes may, by a vote of the majority of their members, against the protest of a minority, *wind up their affairs and close their business if in the exercise of a sound discretion*, they deem it expedient to do so; and may sell the whole of their property to a new corporation, taking payment in shares of the new corporation to be distributed among those of the old stockholders who are willing to take them," citing

Treadwell v. *Salisbury Man. Co.*, 7 Gray (Mass.), 393, 404; S. C., 66 Am. Dec., 490.

In this plain, and we submit controlling view, there is eliminated much unnecessary discussion in reaching a just conclusion in this case. The ownership of nearly ninety-four per cent. of the stock of this corporation could control its dissolution and as certainly properly control the proposition that doubtful and expensive litigation (the sole asset of the company) should cease. Otherwise an insignificant minority could compel the large majority to continue to sink money in a losing business, or as here demand that such majority imperil their *entire* holdings by the unsuccessful outcome of litigation and incur further liability and expense in carrying it on.

IV.

The foregoing view hence eliminates all discussion of the question of abuse of official power and duty, and thus frees this case from the mist of argument indulged in to show that at the demand of these plaintiffs, hold-

ing less than seven per cent. of the capital stock of this corporation, the holders of nearly ninety-four per cent. *must* continue litigation and incur additional corporate and individual expense in carrying it on, even to the extent of destroying the entire value of the capital stock upon the unsuccessful outcome thereof.

The plaintiffs claim as a controlling badge of fraud that Gage was paid by the purchasers of this stock, *in addition to the purchase price*, $50,000 for his services, labor and advances on the company's behalf. There is proof that every stockholder knew of this proposed payment. They all ratified it except these two holders of 13,000 shares out of 200,000. Hallenborg demanded from Gage that *his* option be kept by which he proposed to purchase this same stock at $2.50 per share. He was willing to *buy* at that figure, but condemns *Gage's* sale at that figure, *plus* an additional amount to cover all the company's indebtedness, to the manifest great advantage of the stockholders over Hallenborg's offer. The latter is not here suing to enforce *that* option, but to set aside a sale which netted to his co-stockholders far more than he offered. His record status is sufficient answer to his present position. But assuming *arguendo* that it could on this record and in this cause be held that this payment to Gage for his services, labors and advances should be returned to the stockholders, *all* would have the right to participate. On the basis of 200,000 shares such payment would equal 25 cents per share. Hallenborg could hence demand $2,000 on his 8,000 shares and his co-plaintiff, Addicks, $1,250 on his 5,000 shares. Certainly

they can not demand an accounting for all other stockholders who ratify Gage's actions *in their entirety* and are not hence asking any relief. And as neither *did* sell through Gage, he certainly received *nothing* on their account.

V.

The case of *Hallenborg* v. *Greene* (66 N. Y., App. Div., 596), cited on appellants' brief, must be fully read in order to understand its manifest limitations in respect of pending case. From the statement of the opinion therein it appears that the case was heard upon the complaint and sustaining affidavits alone, the affidavits presented in opposition thereto in the lower court having been, by stipulation, omitted from the record on appeal. The appellants on such record insisted that no case had been made justifying the injunction prayed, and that the appointment of the receiver to do more than take charge of the funds in dispute, then within the jurisdiction of that court, was too broad.

The opinion sets forth the allegations of the complaint as to the fraud, wrong, etc., perpetrated by Greene and Mitchell for the alleged purpose of destroying the Cobre Grande Copper Company. It set up as facts the allegations made in the bill in the present case, but without the material concessions found in the pleadings therein, and of course, wholly without the findings of fact which appear in the present case and which directly contradict these original averments.

It should be carefully noted, however, that the lan-

guage of the Court in the New York case, quoted on page 35 of the appellants' brief, is immediately followed by the Court's emphatic statement that a court of equity in New York is not the proper forum for the exercise of the general jurisdiction and the granting of complete relief sought and given in the lower court. The Court then proceeds to hold that the order of the lower court was too broad in enjoining the Cobre Grande Copper Company from collecting any debts, or paying out or disposing of any of its property or effects, and in appointing a receiver of all its property wheresoever situate, with the right to sue, etc. It did continue the temporary injunction restraining the further consummation of the alleged fraudulent contract and transfer of the mining properties in Mexico and the delivery of the deeds and title papers thereto, and for the adjustment of the actions pending in Mexico, Texas, and New York, after the transfer or delivery of the property involved in those actions, or the proceeds thereof; expressly discharged the Phoenix National Bank from any injunctive obligations, upon the obvious ground that it was not a party to that case, because not having been properly served. The Court (p. 599), then correctly rules that the court in Arizona, having general jurisdiction, had the power to grant all the relief prayed for generally in the bill. But finding $28,000 as proceeds of copper matte within its jurisdiction in New York, it affirmed the appointment of the receiver to preserve that fund *pendente lite* until final judgment in that cause. The order of the lower

court was modified, as thus indicated, and affirmed, *with costs to appellants.*

It will thus be clearly seen that the case heard and decided in the New York Court was so heard upon the complainant's *ex parte* allegations and showing, whereas, in the case at bar, and upon full proof, the findings both of the trial and appellate courts create an entirely different state of affairs, to which we respectfully submit the opinion of the New York Court can have no controlling application.

VI.

We submit the court below ruled correctly, and that its judgment should be affirmed.

Respectfully submitted.

ALDIS R. BROWNE,
ALEXANDER BRITTON,
Of Counsel for Appellees.

BEN. GOODRICH,
Of Counsel.

(Findings VII and VIII, Rec., 196, 197.) Whereupon Gage sold to Greene "upon better terms than anybody else had ever offered" (Finding VIII, Rec., 197), after consulting the directors and a large majority of the stockholders, who urged him to make the sale. The sale and contract represented the entire capital stock, including Hallenborg's 8,000 shares, except that owned by Greene and his associates and about 6,500 shares owned by other parties. The said stockholders accepted and ratified the contract and sale, except Hallenborg, who exercised the right reserved for him in the contract of sale by Gage, and declined to be bound thereby. (Finding VIII, Rec., 199.)

2. Hallenborg's refusal to accept the contract was *solely* because of his claim that *he* held a prior option from Gage for the *same* stock.

(*Letter Hallenborg to Gage, Rec., 110.*)

3. The price paid and accepted under the sale to Greene was $2.50 per share and payment by the latter of the company's indebtedness, including counsel fees, amounting to $135,000, which was so paid by Greene, Gage being also paid $50,000 "as compensation to him for the time, labor, trouble and attention given to said company's business, and for money advanced to and for said company, and expenses paid in attending to the affairs of said company, and in connection therewith." (Finding IX. Rec., 198, 199.)

4. The good faith of the entire transaction on the part of Gage is expressly found. (Finding VIII. Rec., 198.)

I.

Of the 200,000 shares of stock involved, no holders complain, except Hallenborg, with 8,000 shares, and the intervenor, Addicks, with 5,000 shares. All the rest of the shareholders whose stock was thus sold by Gage received the full par value of $2.50 per share; the money to pay the company's debts was also furnished and the compensation paid Gage stands without complaint from a single shareholder, except Hallenborg and Addicks. They represent less than seven per cent. of the entire holdings of capital stock.

The company's sole asset was an expensive litigation which the company's counsel advised Gage could not be successfully maintained. (Finding VIII, Rec., 198). Failure therein meant loss of all value in the capital stock and the burden of an unpaid indebtedness, then amounting to $135,000, with no assets or resources of the company for its payment.

II.

The primary and controlling point is, that Gage was acting as *agent* for these stockholders. All ratified and approved his action except these two plaintiffs; they accepted the payment secured by him for their stock and were relieved of all liability for the then large indebtedness of the company.

It was not a sale of the company's *property*, but of *control* of the corporation. That as part of the sale, it was agreed Gage and the then directors should resign and others among the new owners of the capital stock should

be substituted in their place, was in no possible view inequitable or improper. That is a matter of common occurrence. Gage and all other then directors had sold their entire holdings; they were not competent to remain as directors because not stockholders, while the new stockholders had the right to so replace them.

Authority is not needed for so plain a proposition, but Mr. Thompson, in his Commentaries on the Law of Corporations—Sec. 5371, Vol. 4, foot page 4082—fully and clearly sets forth this plain right, and its plain consequences in thus transferring corporate control where it is not made in fraud of the rights of creditors.

The same author, Sec. 2300, Vol. 2, foot page 1703, observes:

> "The *jus disponendi* being an incident of the ownership of property, the general rule (subject to exceptions hereafter pointed out and discussed) is that every owner of corporate shares has the same uncontrollable right to alien them which attaches to the ownership of any other species of property. The correlative right to purchase corporate shares rests upon similar grounds; the right to become the possessor, by lawful means, of this species of property is as clear a right as the right so to become the possessor of any other species of property, nor can the *motive* influencing the party who makes such a purchase become the subject of a judicial inquiry, where the motive is not in itself unlawful. *Accordingly, it has been held that parties who are interested in opposition to a corporation have the right to purchase its stock in order to defeat a contract which it is about to make.*"

Manifestly the individual stockholders for whom Gage acted and who *ratified* his action, could have individually sold their stock to the same purchaser. Indeed, they threatened so to do. (Testimony Gage, Rec., 77, 78.) Because Gage did the same thing *collectively* for them, and the control of the corporation thereby passed into the same purchaser's hands, can not change the lawful character of the transaction.

III.

With the control of the corporation it was hence natural that in the exercise of lawful right the new purchasers should seek to dismiss all pending litigation. In other words, as admittedly the sole asset of the Cobre Grande Company was litigation, the owners of the company had the right to *stop* the litigation. Holders of some 185,000 shares, or more, of the entire 200,000 shares of capital stock, so desired and so acted. Plaintiffs owning less than seven per cent. of the capital stock here complain that such action was fraudulent and unlawful. Why? All creditors of the company were fully protected because the Company's indebtedness had been provided for. Manifestly such an insignificant minority could not successfully *vote* to carry on the litigation with its attendant heavy expense. The legal result may have been to practically close up the company's business, but that result may lawfully come from the vote of the majority in respect of private corporations performing no public duty. Mr. Thompson, in section 6686, Vol. 5, foot page 528, aptly observes:

treasury of the company in pursuance of the contract of December 12. And finally the court finds "that the temporary restraining order granted in this action, enjoining defendants from carrying out the terms and provisions of the contract of December 12, 1900, and dismissing any and all of the actions then pending in behalf of the Cobre Grande and enjoining defendant Phœnix National Bank from delivering up any of the papers and documents held by it in escrow, evidencing the title held by the Cobre Grande Copper Company in and to the mining property described in the complaint, was modified, and the part of it enjoining the Phœnix National Bank was dissolved upon the ground that the District Court in and for Maricopa County had rendered its decision in the suit of the Cobre Grande Copper Company against Greene and others adversely to said Cobre Grande Copper Company, and that as a part of the judgment of said court the Phœnix National Bank was commanded to deliver up said papers and documents to said defendant Greene, and that as this case now stands there is nothing before the court except an application for the appointment of a receiver."

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the Court.

Both of the lower courts held that the suit had become one for the appointment of a receiver. The Supreme Court said: "The purposes for which a receiver is asked is twofold so far as the record is concerned: First, that he may take charge of the property of the company; second, that he may prosecute its litigation." After some comment the court further observed that the District Court was well within the exercise of a sound discretion in refusing to appoint a receiver, and "that there was not any other relief which the court could properly grant the plaintiffs in the action." We do not find it necessary to decide whether, if plaintiffs' complaint were true, they would not be entitled to greater relief than the appointment of a receiver. We rest our judgment on the merits. In other words, we think the complaint has not been established.

The complaint charges a conspiracy betweeen Greene and Mitchell, being at the time directors of the Cobre Company, to deprive the company of its mines and property and acquire it for themselves, and that in pursuance of the conspiracy they took possession of the company's property. No evidence was offered in the present suit to sustain the charge. Records of suits in which like charges were made cannot be regarded as such. The complaint also charges the contract of December 12, 1900, to be a "fraudulent and corrupt contract and conspiracy of Greene with Gage and other directors of the Cobre Company, to stop the litigation against defendants and to secure to them the undisputed possession of the mines"

from which the Cobre Company had been evicted. Both of the lower courts found against the charge. They found that Gage entered into the contract with the knowledge of the directors of the Cobre Company, and in good faith, upon the advice of counsel of the futility of further pursuing the litigation against Greene and in the belief that "the contract was to the best interest of said company and its stockholders." It may be admitted that Greene's purpose was to stop the litigation against him and quiet his possession of the property, but we cannot assume from this that he was guilty of fraud in making the contract of December 12, or that it was part of a conspiracy with the directors of the Cobre Company to deprive the company of its property. Therefore any fraud in fact is out of the case.

Plaintiffs, however, contend that the contract is fraudulent on its face, and that it was decided so to be by the Supreme Court of New York in *Hallenborg* v. *Greene*, (66 App. Div. Rep. 590.) The pleadings are not set out in the report of the case. We may assume, however, that the complaint was in most part as that in the case at bar.

The case went to the Supreme Court on an appeal from an order granting a preliminary injunction and appointing a receiver. It was heard on the complaint and affidavits of the plaintiff. The affidavits of the defendants were by stipulation omitted from the record. Upon the showing thus made the court said:

"According to the complaint and affidavits the Cobre Company was not only a solvent corporation, but its assets were exceedingly valuable, and through conspiracy, fraud and bribery the defendants Greene and Mitchell have obtained the management and control thereof to further their own scheme in hostility to the interests of the other stockholders, and have actually obtained a contract from the Cobre Company to transfer to these rival companies, controlled and managed by Greene and Mitchell, all its property and property rights, without even a nominal consideration. This fraudulent contract was being consummated with dispatch at the time of the commencement of this action and the granting of the injunction herein. These allegations must be taken as true for the purposes of this appeal, and it is evident that the inevitable consequence will be, not only that the stock of the Cobre Company, of which the plaintiff is a large holder—owning one-twenty-fifth of the entire capital stock—will be rendered worthless, but that there will be no assets with which to pay the claims of creditors, of whom also the plaintiff is one for a substantial amount.

"It needs no refinement of the decisions to show that the cause thus presented is one for equitable cognizance."

The allegations of the plaintiffs were taken to be true, and being so taken the comments of the court may claim justification. In the case at bar the allegations of the complaint, as far as they are passed on, are found to be untrue. The opinion of the Supreme Court of New York, therefore, is of no value to plaintiffs' contention.

We are remitted, therefore, to the contract of December 12. What fraudulent element is there in that? It disposed of the shares of the stock-

holders and it secured the payment of money to the corporation; it settled controversies which, as far as appears, the company had no means of prosecuting, and which, wherever they were tried, had been decided against the company, and where not decided, in the opinion of the company's attorney, would also be decided against the company. We may assume that the stockholders knew or could estimate the value of the properties. They deposited their stock with Gage to sell, became indeed impatient at his delay. We may assume the price of the stock reflected the value of the properties—Hallenborg bought his shares at $2.50. He had an option upon all that were in Gage's hands at that price. He let the option lapse, although negotiation was kept up with him from October to December. Gage then turned to Greene, who, it is found, offered to purchase the stock on better terms than anybody else ever offered. And there was no concealment. Gage was urged by the directors of the company and a large majority of the stockholders to make the contract. It was subsequently formally ratified by the directors and by a majority vote of the stockholders at a stockholders' meeting.

But there were three other elements from which plaintiffs deduce fraud. Gage was given $50,000, as compensation as president of the Cobre Company and other services and expenses paid by him; the attorneys of the company were paid $50,000, for legal services, and there was surrendered to Costello the note which he owed the company. There was no secrecy about these items, and it is manifest from the findings and the evidence that they constituted no inducement to the contract. Whether Gage can be compelled to pay to the Cobre Company the money received by him we need not decide. Its receipt by him did not make the whole contract fraudulent. It did not take from the stockholders the power to sell their stock, nor from the directors of the company the power to control the litigation in which the company was involved, to abandon that litigation or to compromise it. In the exercise of their power they could have done those things directly. It was a matter of form and procedure that it was done in the manner provided by the contract of December 12.

It is deceptive to call or regard the action of the directors as a transfer of the property of the corporation without consideration or for an inadequate consideration. The company had only a right to purchase the property, the conditions of which it had not fulfilled. It claimed legal excuse and brought suits against Greene, but that it had legal excuse was disputed, and seems to have been doubted by all who were interested in the property but the plaintiffs. A jury in Texas had decided against the excuse; and the court in Arizona has also done so. That the latter was subsequent to the contract of December 12 does not militate against it as proof of good faith of the settlement.

This view of the merits of the case renders it unnecessary to pass upon the contention of the defendants that a court of equity has no inherent power, in the absence of statutory authority, to appoint a receiver upon the application of a private person under the circumstances presented by the complaint.

There are assignments of error upon the rulings of the trial court on the admissions of testimony, oral and documentary, which we do not think call for discussion. It is enough to say that they are not well taken.

There is also an assignment of error upon the refusal of the Supreme Court to make certain findings of fact. We think the findings made substantially cover those proposed, certainly to the extent necessary to the case as we have considered it.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No 87.—October Term, 1905.

Axel W. Hallenborg and J. Edward Addicks, Appellants,
vs.
Cobre Grande Copper Company, E. B. Gage, W. M. Adamson, John H. Costello, J. Henry Wood, and Con. O'Keefe, its Directors; William C. Greene, George Mitchell, Phœnix National Bank of Phœnix, Arizona Territory; Cananea Consolidated Copper Company, and Greene Consolidated Copper Company.

Appeal from the Supreme Court of the Territory of Arizona.

[January 8, 1906.]

This is a minority stockholder's suit. It was brought originally by Axel W. Hallenborg as owner of 8,617 shares of the Cobre Grande Copper Company, an Arizona corporation, and also as creditor of that corporation, for advances to the amount of $50,005. The appellant Addicks owned 5,000 shares and was allowed to intervene at the trial, and adopted Hallenborg's complaint.

In November, 1898, defendant (appellee) Greene owned certain mining properties in Sonora, Mexico, and had an option on other properties. He gave an option on these properties to defendant Mitchell. It was provided in the option that $12,500 should be paid in cash and $237,500, as follows: $37,500 on before November 26, 1899; $100,000 on or before November 26, 1900; $100,000 on or before November 26, 1901. In April, 1899, Greene, Mitchell and other parties, under the laws of Arizona, organized the Cobre Company. One hundred and ninety-nine thousand nine hundred and ninety-five shares of the stock were turned over to Mitchell in consideration of his option from Greene, which option was assigned to the Cobre Company subject to Greene's rights. The Cobre Company went into possession and was in possession in September, 1899. In October of that year controversies arose between Greene and the company over the option and the right to possession of the properties, and Greene entered into possession of them. Thereupon the company instituted suits in the courts of Mexico to gain possession of the properties, and also instituted a suit in the District Court of Maricopa County, Arizona, to restrain the delivery to Greene of the deeds which were put in escrow under the contract with Mitchell, which had been assigned to the Cobre Company. In the latter suit an injunction was granted restraining Greene from demanding or re-

ceiving the deeds. A suit was also brought in New York and one in Texas to recover the product of the mines. In the suit in Arizona the Cobre Company alleged, among other things, in substance, all the facts set forth in paragraph three of the original complaint in the present suit, and prayed that Greene be required to account for the proceeds of the products of the mines and other property alleged to have been appropriated by him. Issue was joined by the defendants therein, the case tried and a judgment entered dismissing the complaint. The judgment was not appealed from. At the time of the judgment the plaintiffs were stockholders of the Cobre Company.

While the litigation was pending the stockholders of the Cobre Company, or a majority of them, comprising stockholders to the number of 115,049 shares, entered into a pooling arrangement, whereby all of their stock was delivered to defendant Gage, with power to vote the same at all meetings of the stockholders. Subsequently Gage was granted the right to dispose of and sell the stock at his discretion. Several attempts were made by Gage to sell the stock at $2.50 a share, which failed on account of the other contracting parties not complying with their contracts. The plaintiff Hallenborg and John H. Costello opened negotiations with Gage for the stock at $2.50 a share. This also failed on account of objection by Costello to the contract which was drawn, although negotiations were kept up until December, 1900. Then Gage opened negotiations with Greene, who offered to buy the stock, upon better terms than anybody else had offered. Gage consulted the directors and they urged him to enter into a contract with Greene. The stock represented by Gage represented the entire stock of the company, including Hallenborg's 8,000 shares, except that owned by Greene and his associates and about 6,500 shares owned by other parties. Gage entered into a contract with Greene, December 12, 1900, and it was ratified in its entirety by the directors and by a majority vote of the stockholders. Hallenborg was present by attorney at the meeting and protested against the ratification. The contract was complied with by Greene and he paid the full purchase price for the shares, and they were delivered to him and the Greene Copper Company. All of the stockholders accepted the money so paid except Hallenborg, who returned the money sent to him and declined to be bound by the contract.

The court finds that the contract was made with Greene in good faith, with full knowledge and consent of the directors and upon the advice of counsel of the Cobre Company, that the company could not successfully maintain the suit brought in Arizona, and with the full belief on the part of Gage that the contract was for the best interest of the company and its stockholders. And the court further finds that no agreement was made between Gage or other persons, whereby the directors, Adamson, Wood,

O'Keefe, or any of them, were to derive benefit or did derive any benefit whatsoever, except such as they derived from the sale of their stock.

The contract of December 12, between Gage and Greene, provided for the payment of the stock in certain instalments. Greene was to pay to Gage $25,000 in cash in addition to the $2.50 per share, and also pay to Gage $30,000, and in addition 3,000 shares of the capital stock of the Greene Consolidated Copper Company, or, in lieu thereof, $30,000 in cash. Gage was given the privilege of taking, instead of $2.50 per share for shares of stock in the Cobre Company, stock in the Greene Consolidated Copper Company—four of the former for one of the latter—the option to be exercised before payment of the second instalment on the stock of the Combre Company. Five thousand shares of the Greene Consolidated Copper Company were provided to be paid to Gage for his own use and benefit, and 5,000 shares for the use and benefit of L. H. Chalmers, Baker & Bennett, and Herndon & Norris, attorneys at law in Arizona.

It was also agreed that a certain promissory note given by J. H. Costello to the Cobre Company, amounting to $23,000, was to be surrendered to Costello. This note was conditioned upon the Cobre Company obtaining possession of its property in Mexico, and was not to be paid until ninety days after such recovery. It was also agreed that the suits brought by the Cobre Company in New York, Texas, and Arizona should be dismissed. The other provisions of the contract are but incident to those before given and may be omitted. The suits in New York are still pending. All the other suits were dismissed or otherwise disposed of by final judgment prior to this suit. The $25,000 mentioned in the contract of December 12 was for the purpose of taking up and discharging certain notes due by the Cobre Company. It was so paid. The $30,000 mentioned was to be and it was turned into the treasury of the company to pay its debts. The 3,000 shares in the Greene Consolidated Company, or the alternative $30,000, was also for the purpose of paying the debts of the Cobre Company outside of the $25,000 before mentioned. It was paid into the treasury. The 5,000 shares of stock in the Greene Consolidated Company was intended by all parties as compensation to Gage as president of the Cobre Company, and for the time, labor and trouble given to the company's business, and for money advanced for it and expenses paid in attending to its affairs. Instead of shares, as provided, a cash payment of $50,000 was made to him. The share paid to Chalmers and Baker & Bennett, Herndon & Norris were intended to be paid as compensation as attorneys for the company for their services in various litigations. Instead of the shares a cash payment of $50,000 was made, and it is found that their services were reasonably worth that sum. The note against Costello was surrendered to him.

The court also finds that the only property in possession of the Cobre Company within the jurisdiction of the court is the money paid into the